THE GENERAL STATUTES OF NORTH CAROLINA

ANNOTATED

1995 CUMULATIVE SUPPLEMENT

Volume 7

Chapters 28 through 41

Prepared under the Supervision of

The Department of Justice
of the State of North Carolina

BY

The Editorial Staff of the Publishers

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Annotated through 457 S.E.2d 524. For complete scope of annotations, see scope of volume page.

Place Behind Supplement Tab in Binder Volume. This Supersedes Previous Supplement, Which May Be Retained for Reference Purposes.

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Preface

This Cumulative Supplement to Volume 7 contains the general laws of a permanent nature enacted by the General Assembly through the 1995 Regular Session, which are within the scope of such volume, and brings to date the annotations included therein.

Amendments are inserted under the same section numbers appearing in the General Statutes, and new laws appear under the proper chapter headings.

Chapter analyses show all affected sections, except sections for which catchlines are carried for the purposes of notes only. An index to all statutes codified herein will appear in the Replacement Index Volumes.

A majority of the Session Laws are made effective upon ratification, but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after 30 days after the adjournment of the session" in which passed.

Beginning with the opinions issued by the North Carolina Attorney General on July 1, 1969, any opinion which construes a specific statute is cited as an annotation to that statute. For a copy of an opinion or of its headnotes write the Attorney General, P. O. Box 629, Raleigh, N.C. 27602.

The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes or in this Cumulative Supplement and any suggestions they may have for improving the General Statutes, to the Department of Justice of the State of North Carolina, or to The Michie Company, Law Publishers, Charlottesville, Virginia.

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User's Guide

In order to assist both the legal profession and the layperson in obtaining the maximum benefit from the North Carolina General Statutes, a User's Guide has been included in Volume 1. This guide contains comments and information on the many features found within the General Statutes intended to increase the usefulness of this set of laws to the user. See the main volume for the complete User's Guide.

Scope of Volume

Statutes:

Permanent portions of the General Laws enacted by the General Assembly through the 1995 Regular Session affecting Chapters 28 through 41 of the General Statutes.

Annotations:

Sources of the annotations to the General Statutes appearing in this volume are:

North Carolina Reports through Volume 340, p. 364.
North Carolina Court of Appeals Reports through Volume 118, p. 737.
South Eastern Reporter 2nd Series through Volume 457, p. 524.
Federal Reporter 3rd Series through Volume 53, p. 349.
Federal Supplement through Volume 882, p. 1100.
Federal Rules Decisions through Volume 160, p. 664.
Bankruptcy Reports through Volume 181, p. 677.
Supreme Court Reporter through Volume 115, p. 2020.
North Carolina Law Review through Volume 73, p. 1760.
Wake Forest Law Review through Volume 30, p. 426.
Campbell Law Review through Volume 17, p. 163.
Duke Law Journal through Volume 44, p. 1049.
North Carolina Central Law Journal through Volume 21, p. 178.
Opinions of the Attorney General.

The General Statutes of North Carolina
1995 Cumulative Supplement

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Cited in In re Estate of Bryant, 116 N.C. App. 329, 447 S.E.2d 468 (1994).

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Jurisdiction for Probate of Wills and Administration of Estates of Decedents.

§ 28A-2-1. Clerk of superior court.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Jurisdiction Exclusive. — Although § 7A-241 provides that exclusive original jurisdiction in probate matters is vested in the "superior court division," this section specifies that the clerk is given exclusive original jurisdiction in the administration of decedents' estates except in cases where the clerk is disqualified to act. In re Estate of Longest, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied and appeal dismissed, 314 N.C. 330, 333 S.E.2d 488 (1985).

Exclusive Jurisdiction to Appoint Administrators Lies with Clerk of Superior Court. — A superior court judge lacks jurisdiction to appoint an administrator, because the original and exclusive jurisdiction to appoint administrators lies with the clerk of superior court. Brace v. Strother, 90 N.C. App. 357, 368 S.E.2d 447, cert. denied, 323 N.C. 171, 373 S.E.2d 104 (1988).

Derivative Jurisdiction of Judge. — In most instances the superior court judge's probate jurisdiction is, in effect, that of an appellate court, because his jurisdiction is derivative and not concurrent. In re Estate of Longest, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied and appeal dismissed, 314 N.C. 330, 333 S.E.2d 488 (1985).

Procedure on Appeal from Order of Clerk. — In an appeal from an order of the clerk in a probate matter, the superior court is not required to conduct a de novo hearing. Rather, when a finding of fact by the clerk of court is properly challenged by specific exception, the superior court judge will review those findings, and either affirm, reverse, or modify them. If he deems it advisable, he may submit the issue to a jury, which course he could not follow without hearing evidence. In re Estate of Longest, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied and appeal dismissed, 314 N.C. 330, 333 S.E.2d 488 (1985).

Action for Breach of Duties, Negligence, and Fraud in Administration of Estate. —

In accord with original. See Ingle v. Allen, 69 N.C. App. 192, 317 S.E.2d 1, cert. denied, 311 N.C. 757, 321 S.E.2d 135 (1984).

Cited in In re Estate of Tucci, 94 N.C. App. 428, 380 S.E.2d 782 (1989); In re Estate of Wright, 114 N.C. App. 659, 442 S.E.2d 540, cert. denied, 338 N.C. 516, 453 S.E.2d 174 (1994).

§ 28A-2-3. Jurisdiction where clerk interested.

CASE NOTES

Applied in Matthews v. Watkins, 91 N.C. App. 640, 373 S.E.2d 133 (1988).

ARTICLE 3.

Venue for Probate of Wills and Administration of Estates of Decedents.

§ 28A-3-1. Proper county.

The venue for the probate of a will and for all proceedings relating to the administration of the estate of a decedent shall be:

(1) In the county in this State where the decedent had his domicile at the time of his death; or

(2) If the decedent had no domicile in this State at the time of death, then in any county wherein the decedent left any property or assets or into which any property or assets belonging to this estate may have come. If there be more than one such county, that county in which proceedings are first commenced shall have priority of venue; or

(3) If the decedent was a nonresident motorist who died in the State, then in any county in the State. (R.C., c. 46, s. 1; C.C.P., s. 433; 1868-9, c. 113, s. 115; Code, s. 1374; Rev., s. 16; C.S., s. 1; 1931, c. 165; 1943, c. 543; 1951, c. 765; 1973, c. 1329, s. 3.)

Editor's Note. — Subdivision (1) of this section is set out above to correct a typographical error in the main volume.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Venue of a proceeding in the nature of a creditor's supplemental proceeding under § 1-307, in which in order to issue an execution on defendant's interest under his father's will, the trial judge was required to find only that defendant possessed some interest under his father's will, was governed by § 1-307, and not by this section. North Carolina Nat'l Bank v. C.P. Robinson Co., 319 N.C. 63, 352 S.E.2d 684 (1987).

ARTICLE 4.

Qualification and Disqualification for Letters Testamentary and Letters of Administration.

§ 28A-4-1. Order of persons qualified to serve.

(a) Letters Testamentary. — Letters testamentary shall be granted to the executor or executors named or designated in the will, or if no such person qualifies, to any substitute or successor executor named or designated in the will. If no person so named or designated qualifies, letters testamentary shall be granted to some other person nominated by a person upon whom the will expressly confers the authority to make such nomination. If none of the foregoing persons qualifies or if the clerk of superior court upon hearing finds that none of the foregoing persons is qualified in accordance with G.S. 28A-4-2, the clerk shall grant letters of administration in accordance with subsection (b).

(b) Letters of Administration. — Letters of administration shall be granted to persons who are qualified to serve, in the following order, unless the clerk of superior court in his discretion determines that the best interests of the estate otherwise require:

(1) The surviving spouse of the decedent;
(2) Any devisee of the testator;
(3) Any heir of the decedent;
(3a) Any next of kin, with a person who is of a closer kinship as computed pursuant to G.S. 104A-1 having priority;
(4) Any creditor to whom the decedent became obligated prior to his death;
(5) Any person of good character residing in the county who applies therefor; and
(6) Any other person of good character not disqualified under G.S. 28A-4-2.

When applicants are equally entitled, letters shall be granted to the applicant who, in the judgment of the clerk of superior court, is most likely to administer the estate advantageously, or they may be granted to any two or more of such applicants. (R.C., c. 46, ss. 2, 3; C.C.P., s. 456; 1968-9, c. 113, s. 115; Code, s. 1376; Rev., s. 3; C.S., s. 6; 1949, c. 22; 1973, c. 1329, s. 3; 1987, c. 357.)

CASE NOTES

III. Letters of Administration.

III. LETTERS OF ADMINISTRATION.

Next of Kin. — For purposes of this section, "next of kin" refers to the class of blood relatives of the decedent; thus, the court erred in determining that the term was synonymous with "heirs," as used in § 41-6.1. In re Estate of Bryant, 116 N.C. App. 329, 447 S.E.2d 468 (1994).

Correction of Error in Appointment. — Petitioner, an heir at law and beneficiary under will, had a higher preference of appointment than respondent, who was neither an heir nor a beneficiary, and as the respondent should not have been appointed administrator C.T.A. without notice to the petitioner, it was not error for the clerk to correct this error by removing the respondent as administrator C.T.A. The fact that petitioner may not have been qualified to serve as administrator C.T.A. under § 28A-4-2(4) because she was a nonresident of this State who had not appointed a process agent was irrelevant. In re Estate of Cole, 80 N.C. App. 720, 343 S.E.2d 263 (1986).

Applied in In re Estate of Bryant, 116 N.C. App. 329, 447 S.E.2d 468 (1994).

§ 28A-4-2. Persons disqualified to serve as personal representative.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Correction of Error in Appointment. — Petitioner, an heir at law and beneficiary under will, had a higher preference of appointment than respondent, who was neither an heir nor a beneficiary, and as the respondent should not have been appointed administrator C.T.A. without notice to the petitioner, it was not error for the clerk to correct this error by removing the respondent as administrator C.T.A. The fact that petitioner may not have been qualified to serve as administrator C.T.A. under subdivision (4) of this section because she was a nonresident of this State who had not appointed a process agent was irrelevant. In re Estate of Cole, 80 N.C. App. 720, 343 S.E.2d 263 (1986).

Applied in Storey v. Hailey, 114 N.C. App. 173, 441 S.E.2d 602 (1994).

ARTICLE 5.

Renunciation by Personal Representative.

§ 28A-5-2. Renunciation of right to administer.

CASE NOTES

Cited in Ragan v. Hill, 337 N.C. 667, 447 S.E.2d 371 (1994).

ARTICLE 6.

Appointment of Personal Representative.

§ 28A-6-2. Letters issued without notice; exceptions.

CASE NOTES

Correction of Error in Appointment. — Petitioner, an heir at law and beneficiary under will, had a higher preference of appointment than respondent, who was neither an heir nor a beneficiary, and as the respondent should not have been appointed administrator C.T.A. without notice to the petitioner, it was not error for the clerk to correct this error by removing the respondent as administrator C.T.A. The fact that petitioner may not have been qualified to serve as administrator C.T.A. under § 28A-4-2(4) because she was a nonresident of this State who had not appointed a process agent was irrelevant. In re Estate of Cole, 80 N.C. App. 720, 343 S.E.2d 263 (1986).

ARTICLE 9.

Revocation of Letters.

§ 28A-9-1. Revocation after hearing.

CASE NOTES

I. General Consideration.
III. Default or Misconduct.

I. GENERAL CONSIDERATION.

Section 1A-1, Rule 58 Inapplicable to Denial of Motion to Revoke. — Section 1A-1, Rule 58 has no application in case involving the denial of a motion made before the clerk of superior court pursuant to this section to revoke the letters testamentary of executor. In re Estate of Trull, 86 N.C. App. 361, 357 S.E.2d 437 (1987).

Proceeding to remove an executor and a civil suit for damages are not the same cause of action. The proceeding to remove an executor is purely statutory, with probate jurisdiction vested in the clerk of superior court, and reviewable by a superior court judge on appeal. A civil suit for damages involves a full trial with the right to have factual issues resolved by a jury. Shelton v. Fairley, 72 N.C. App. 1, 323 S.E.2d 410 (1984), cert. denied, 313 N.C. 509, 329 S.E.2d 394 (1985).

Statutory action to remove administrators or executors is not res judicata in any other proceeding which the parties are entitled to pursue. Shelton v. Fairley, 72 N.C. App. 1, 323 S.E.2d 410 (1984), cert. denied, 313 N.C. 509, 329 S.E.2d 394 (1985).

A proceeding under this section is not res judicata in a civil action for damages. Shelton v. Fairley, 72 N.C. App. 1, 323 S.E.2d 410 (1984), cert. denied, 313 N.C. 509, 329 S.E.2d 394 (1985).

Orders entered in a proceeding under this section, in which an executor must show cause why he should not be removed, do not constitute res judicata as to a later civil action for damages between the parties or collaterally estop the bringing of such an action. Shelton v. Fairley, 72 N.C. App. 1, 323 S.E.2d 410 (1984), cert. denied, 313 N.C. 509, 329 S.E.2d 394 (1985).

Beneficiaries Seeking Removal Not Held to Election of Remedies. — Prejudice would result if, when beneficiaries sought to remove an executor, they were held to an election of remedies and could not later bring a civil action for damages. Such a policy would either chill exercise of the right to seek statutory removal of an executor or force beneficiaries prematurely to bring civil actions for damages. Shelton v. Fairley, 72 N.C. App. 1, 323 S.E.2d 410 (1984), cert. denied, 313 N.C. 509, 329 S.E.2d 394 (1985).

Denial of Motion to Revoke "Entered" When Clerk Announced After Hearing He Would Deny It. — Clerk's order denying motion to revoke letters testamentary was "entered" when the clerk announced after hearing that he would deny the petition. The party aggrieved by the ruling, the petitioner, was present and even excepted to the order, had ten days thereafter to give notice of appeal pursuant to § 1-272. In re Estate of Trull, 86 N.C. App. 361, 357 S.E.2d 437 (1987).

Verification Sufficient. — Signing of petition for revocation before a notary public under oath, petitioner having sworn that the matters stated in the petition upon her information and belief were true, constituted sufficient verification required by this section. In re Estate of Longest, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied and appeal dismissed, 314 N.C. 330, 333 S.E.2d 488 (1985).

"Special Proceeding." — The procedure for the revocation of the letters testamentary of an administratrix as set forth in this section is a "special proceeding," and the clerk had statutory authority to appoint the guardian ad litem. In re Estate of Sturman, 93 N.C. App. 473, 378 S.E.2d 204 (1989).

The minor heirs had a vested interest in who administered the estate of their deceased father and were entitled under this section to appeal the decision of the clerk on the revocation issue. This was sufficient to bring the matter within the purview of Rule 17 providing it was an "action or special proceeding." In re Estate of Sturman, 93 N.C. App. 473, 378 S.E.2d 204 (1989).

Quoted in In re Estate of Armfield, 113 N.C. App. 467, 439 S.E.2d 216 (1994).

III. DEFAULT OR MISCONDUCT.

Executor's acceptance of commissions based on an erroneous interpretation of a statute would not be misconduct requiring revocation of letters testamentary. Matthews v. Watkins, 91 N.C. App. 640, 373 S.E.2d 133 (1988), aff'd, 324 N.C. 541, 379 S.E.2d 857 (1989).

Allegations of Misconduct Held Sufficient. — Allegations that coexecutor failed to timely file estate accountings with the clerk's office, disregarding notices issued by the clerk that such accountings were due, that he paid himself approximately $32,900 from the estate for his commission and attorneys' fees without approval of the clerk and that this amount was in excess of any amount which he could legally be allowed for commissions and legal fees, and that through his default and misconduct he had violated his fiduciary duty as a coexecutor of the estate constituted sufficient grounds upon which executrix could petition for the revocation of coexecutor's letters under subdivision (a)(3) of this section. In re Estate of Longest, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied, 314 N.C. 330, 333 S.E.2d 488 (1985).

ARTICLE 11.

Collectors.

§ 28A-11-3. Duties and powers of collectors.

CASE NOTES

Stated in Brace v. Strother, 90 N.C. App. 357, 368 S.E.2d 447 (1988).

ARTICLE 13.

Representative's Powers, Duties and Liabilities.

§ 28A-13-1. Time of accrual of duties and powers.

CASE NOTES

Testamentary directions for disposition of the testator's body must be treated as valid upon the death of the testator, and funeral directors who act upon the provision in good faith cannot later be held liable in tort because they acted before the will was probated. Dumouchelle v. Duke Univ., 69 N.C. App. 471, 317 S.E.2d 100 (1984).

A testamentary provision directing disposition of the testator's body must prevail over conflicting wishes of the testator's next-of-kin and the next-of-kin in such a case have no right to possession of the body for the purpose of selecting funeral arrangements and therefore they have no standing to sue for negligence for failure to carry out their instructions for disposal of testator's body. Dumouchelle v. Duke Univ., 69 N.C. App. 471, 317 S.E.2d 100 (1984).

Cited in Horne v. Owens-Corning Fiberglas Corp., 4 F.3d 276 (4th Cir. 1993).

§ 28A-13-3. Powers of a personal representative or fiduciary.

(a) Except as qualified by express limitations imposed in a will of the decedent or a court order, and subject to the provisions of G.S. 28A-13-6 respecting the powers of joint personal representatives, a personal representative has the power to perform in a reasonable and prudent manner every act which a reasonable and prudent man would perform incident to the collection, preservation, liquidation or distribution of a decedent's estate so as to accomplish the desired result of settling and distributing the decedent's estate in a safe, orderly, accurate and expeditious manner as provided by law, including but not limited to the powers specified in the following subdivisions:

(1) To take possession, custody or control of the personal property of the decedent. If in the opinion of the personal representative his possession, custody or control of such property is not necessary for purposes of administration, such property may be left with or surrendered to the heir or devisee presumptively entitled thereto. He has the power to take possession, custody or control of the real property of the decedent if he determines such possession, custody or control is in the best interest of the administration of the estate. Prior to exercising such power over real property the procedure as set out in subsection G.S. 28A-13-3(c) shall be followed. If the personal representative determines that such possession, custody or control is not in the best interest of the administration of the estate such property may be left with or surrendered to the heir or devisee presumptively entitled thereto.

(2) To retain assets owned by the decedent pending distribution or liquidation even though such assets may include items which are otherwise improper for investment of trust funds.

(3) To receive assets from other fiduciaries or other sources.

(4) To complete performance of contracts entered into by the decedent that continue as obligations of his estate, or to refuse to complete such contracts, as the personal representative may determine to be in the best interests of the estate, but such refusal shall not limit any cause of action which might have been maintained against decedent if he had refused to complete such contract. In respect to enforceable contracts by the decedent to convey an interest in land, the provisions of G.S. 28A-17-9 are controlling.

(5) To deposit, as a fiduciary, funds of the estate in a bank, including a bank operated by the personal representative upon compliance with the provisions of G.S. 36A-63.

(6) To make, as a fiduciary, any form of investment allowed by law to the State Treasurer under G.S. 147-69.1, with funds of the estate, when such are not needed to meet debts and expenses immediately payable and are not immediately distributable, including money received from the sale of other assets; or to enter into other short-term loan arrangements that may be appropriate for use by trustees or beneficiaries generally. Provided, that in addition to the types of investments hereby authorized, deposits in interest-bearing accounts of any credit union authorized to do business in this State, when such deposits are insured in the same manner as required by G.S. 147-69.1 for deposits in a savings and loan association, are hereby authorized.

(7) To abandon or relinquish all rights in any property when, in the opinion of the personal representative acting reasonably and in good faith, it is valueless, or is so encumbered or is otherwise in such condition that it is of no benefit to the estate.

(8) To vote shares of stock or other securities in person or by general or limited proxy, and to execute waivers, consents or objections with respect to such stock or securities.

(9) To pay calls, assessments, and any other sums chargeable or accruing against or on account of securities.

(10) To hold shares of stock or other securities in the name of a nominee, without mention of the estate in the instrument representing stock or other securities or in registration records of the issuer thereof; provided, that

a. The estate records and all reports or accounts rendered by the personal representative clearly show the ownership of the stock or other securities by the personal representative and the facts regarding its holdings, and

b. The nominee shall not have possession of the stock or other securities or access thereto except under the immediate supervision of the personal representative or when such securities are deposited by the personal representative in a clearing corporation as defined in G.S. 25-8-102(3).

Such personal representative shall be personally liable for any acts or omissions of such nominee in connection with such stock or other securities so held, as if such personal representative had done such acts or been guilty of such omissions.

(11) To insure, at the expense of the estate, the assets of the estate in his possession, custody or control against damage or loss.

(12) To borrow money for such periods of time and upon such terms and conditions as to rates, maturities, renewals, and security as the personal representative shall deem advisable, including the power of a corporate personal representative to borrow from its own banking department, for the purpose of paying debts, taxes, and other claims against the estate, and to mortgage, pledge or otherwise encumber such portion of the estate as may be required to secure such loan or loans. In respect to the borrowing of money on the security of the real property of the decedent, G.S. 28A-17-11 is controlling.

(13) To renew obligations of the decedent for the payment of money.

(14) To advance his own money for the protection of the estate, and for all expenses, losses and liabilities sustained in the administration of the estate or because of the holding or ownership of any estate assets. For such advances, with any interest, the personal representative shall have a lien on the assets of the estate as against a devisee or heir.

(15) To compromise, adjust, arbitrate, sue on or defend, abandon, or otherwise deal with and settle claims in favor of or against the estate.

(16) To pay taxes, assessments, his own compensation, and other expenses incident to the collection, care, administration and protection of the assets of the estate in his possession, custody or control.

(17) To sell or exercise stock subscription or conversion rights; consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise.

(18) To allocate items of income or expense to either estate income or principal, as permitted or provided by law.

(19) To employ persons, including attorneys, auditors, investment advisors, appraisers or agents to advise or assist him in the performance of his administrative duties.

(20) To continue any business or venture in which the decedent was engaged at the date of his death, where such continuation is reasonably necessary or desirable to preserve the value, including goodwill, of the decedent's interest in such business. With respect to the use of the decedent's interest in a continuing partnership, the provisions of G.S. 59-71 and 59-72 qualify this power; and with respect to farming operations engaged in by the decedent at the time of his death, the provisions of G.S. 28A-13-4 qualify this power.

(21) To incorporate or participate in the incorporation of any business or venture in which the decedent was engaged at the time of his death.

(22) To provide for the exoneration of the personal representative from personal liability in any contract entered into on behalf of the estate.

(23) To maintain actions for the wrongful death of the decedent according to the provisions of Article 18 of this Chapter and to compromise or settle any such claims, whether in litigation or not. Unless all persons who would be entitled to receive any damages recovered under G.S. 28A-18-2(b)(4) are competent adults and have consented in writing, any

such settlement shall be subject to the approval of a judge of the court or tribunal exercising jurisdiction over the action or a judge of the district or superior court in cases where no action has previously been filed. If the claim is brought under Article 31 of Chapter 143 of the General Statutes, the settlement is subject to the approval of the Industrial Commission in accordance with that Article. It shall be the duty of the personal representative in distributing the proceeds of such settlement in any instance to take into consideration and to make a fair allocation to those claimants for funeral, burial, hospital and medical expenses which would have been payable from damages which might have been recovered had a wrongful death action gone to judgment in favor of the plaintiff.

(24) To maintain any appropriate action or proceeding to recover possession of any property of the decedent, or to determine the title thereto; to recover damages for any injury done prior to the death of the decedent to any of his property; and to recover damages for any injury done subsequent to the death of the decedent to such property.

(25) To purchase at any public or private sale of any real or personal property belonging to the decedent's estate or securing an obligation of the estate as a fiduciary for the benefit of the estate when, in his opinion, it is necessary to prevent a loss to the estate.

(26) To sell or lease personal property of the estate in the manner prescribed by the provisions of Article 16 of this Chapter.

(27) To sell or lease real property of the estate in the manner prescribed by the provisions of Article 17 of this Chapter.

(28) To enter into agreements with taxing authorities to secure the benefit of the federal marital deduction pursuant to G.S. 28A-22-6.

(29) To pay or satisfy the debts and claims against the decedent's estate in the order and manner prescribed by Article 19 of this Chapter.

(30) To distribute any sum recovered for the wrongful death of the decedent according to the provisions of G.S. 28A-18-2; and to distribute all other assets available for distribution according to the provisions of this Chapter or as otherwise lawfully authorized.

(31) To exercise such additional lawful powers as are conferred upon him by the will.

(32) To execute and deliver all instruments which will accomplish or facilitate the exercise of the powers vested in the personal representative.

(33) To renounce in accordance with the provisions of Chapter 31B of the General Statutes.

(a1) Except as qualified by express limitations imposed in a will of the decedent, and subject to the provisions of G.S. 28A-13-6 respecting the powers of joint personal representatives, a personal representative shall have absolute discretion to make the election as to which items of the decedent's personal and household effects shall be excluded from the carry over basis provision of the federal income tax law and such election shall be conclusive and binding on all concerned.

(b) Any question arising out of the powers conferred by subsections (a) and (a1) above shall be determined in accordance with the provisions of Article 18 of this Chapter.

(c) Prior to the personal representative exercising possession, custody or control over real property of the estate he shall petition the clerk of court to obtain an order authorizing such possession, custody or control. The petition shall include:

(1) A description of the real property which is the subject of the petition;
(2) The names, ages, and addresses, if known, of the devisees and heirs of the decedent;
(3) A statement by the personal representative that he has determined that such possession, custody or control is in the best interest of the administration of the estate.

The devisees and heirs will be made parties to the proceeding by service of summons in the manner prescribed by law. If the clerk of court determines that it is in the best interest of the administration of the estate to authorize the personal representative to take possession, custody or control he shall grant an order authorizing that power. (1868-9, c. 113, ss. 73, 77; Code, ss. 1501, 1505; Rev., ss. 85, 159; C.S., ss. 170, 171; 1925, c. 86; 1933, cc. 161, 196, 498; 1973, c. 1329, s. 3; 1975, c. 19, s. 9; c. 371, s. 4; 1977, c. 556; 1979, c. 467, s. 21; c. 717, s. 3; 1985, c. 689, s. 8; 1991, c. 460, s. 3; 1995, c. 401, s. 1.)

Local Modification. — City of Winston-Salem: 1995, c. 112, s. 1.

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, in subdivision (a)(23) divided the former first sentence into the present first and second sentences, deleted "provided that any such settlement shall be subject to the approval of a judge of superior court" at the end of the present first sentence, added "any such settlement shall be subject to the approval of a judge of the court or tribunal exercising jurisdiction over the action or a judge of the district or superior court in cases where no action has previously been filed" in the present second sentence, and added the third sentence.

CASE NOTES

Duty to Obtain Approval of Settlement. — This statute does not stipulate which party has the responsibility of obtaining judicial approval; however, the appellate court concluded the administrator-plaintiff, not the defendant in wrongful death action, had a duty to seek judicial approval of settlement. Boomer v. Caraway, 116 N.C. App. 723, 449 S.E.2d 215 (1994), cert. granted, 339 N.C. 609, 454 S.E.2d 246 (1995).

Prior Settlement and Approval of Attorneys' Fees Not Bar to Malpractice Suit. — Settlement and approval of attorneys' fees in previous wrongful death action was not a bar to suit for attorney malpractice alleging negligence and breach of fiduciary duty; collateral estoppel was not applicable so as to support summary judgment in favor of defendants. Beckwith v. Llewellyn, 326 N.C. 569, 391 S.E.2d 189 (1990).

Stated in Brace v. Strother, 90 N.C. App. 357, 368 S.E.2d 447 (1988).

Cited in Severance v. Ford Motor Co., 98 N.C. App. 330, 390 S.E.2d 704 (1990); Beckwith v. Llewellyn, 326 N.C. 569, 391 S.E.2d 189 (1990); Horne v. Owens-Corning Fiberglas Corp., 4 F.3d 276 (4th Cir. 1993); McInnis v. Provident Life & Accident Ins. Co., 21 F.3d 586 (4th Cir. 1994).

§ 28A-13-6. Exercise of powers of joint personal representatives by one or more than one.

(a) As used in this section, the term "personal representatives" includes testamentary trustees.

(b) If a will expressly makes provision for the execution of any of the powers of personal representatives by all of them or by any one or more of them, the provisions of the will govern.

(c) If there is no governing provision in the will, personal representatives may, by written agreement signed by all of them and filed with and approved by the clerk of superior court of the county in which such personal representatives qualified, provide that any one or more of the following powers of personal representatives may be exercised by any designated one or more of them:

(1) Open bank accounts and draw checks thereon;
(2) Subject to the provisions of G.S. 105-24, enter any safe-deposit box of the deceased or any safe-deposit box rented by the personal representative or representatives;
(3) Employ attorneys and accountants;
(4) List property for taxes and prepare and file State, municipal and county tax returns;
(5) Collect claims and debts due the estate and give receipts therefor;
(6) Pay claims against and debts of the estate;
(7) Compromise claims in favor of or against the estate;
(8) Have custody of property of the estate.

(d) Subject to subsection (b) of this section, if two or more personal representatives own shares of corporate stock or other securities, their acts with respect to voting shall have the following effect:

(1) If only one votes, in person or by proxy, his act binds all;
(2) If more than one vote, in person or by proxy, the act of the majority so voting binds all;
(3) If one or more vote, in person or by proxy, but the vote is evenly split on any particular matter, each fraction is entitled to vote the stock or other securities in question proportionately.

(e) Subject to the provisions of subsections (b), (c) and (d) of this section, all other acts and duties must be performed by both of the personal representatives if there are two, and by a majority of them if there are more than two. No personal representative who has not joined in exercising a power shall be liable for the consequences of such exercise, nor shall a dissenting personal representative be liable for the consequences of an act in which he joins at the direction of the majority of the personal representatives, if he expressed his dissent in writing to any other personal representative at or before the time of such joinder.

(f) No personal representative shall be relieved of liability on his bond or otherwise by entering into any agreement under this section. (1959, c. 1160; 1973, c. 1329, s. 3; 1977, c. 446, s. 1; 1991, c. 460, s. 1.)

§ 28A-13-10. Liability of personal representative.

CASE NOTES

Liability for Depreciation of Assets. — An executor, in performing those duties related to managing the estate's assets, acts as a trustee to beneficiaries of the estate. As such, the executor is liable for the depreciation of assets which an ordinarily prudent fiduciary would not have allowed to occur. Fortune v. First Union Nat'l Bank, 87 N.C. App. 1, 359 S.E.2d 801 (1987), rev'd on other grounds, 323 N.C. 146, 371 S.E.2d 483 (1988).

Article 14.

Notice to Creditors.

§ 28A-14-1. Notice for claims.

(a) Every personal representative and collector after the granting of letters shall notify all persons, firms and corporations having claims against the decedent to present the same to such personal representative or collector, on or before a day to be named in such notice, which day must be at least three months from the day of the first publication or posting of such notice. The notice shall set out a mailing address for the personal representative or collector. The notice shall be published once a week for four consecutive weeks in a newspaper qualified to publish legal advertisements, if any such newspaper is published in the county. If there is no newspaper published in the county, but there is a newspaper having general circulation in the county, then at the option of the personal representative, or collector, the notice shall be published once a week for four consecutive weeks in the newspaper having general circulation in the county and posted at the courthouse or the notice shall be posted at the courthouse and four other public places in the county. Personal representatives are not required to publish or mail notice to creditors if the only asset of the estate consists of a claim for damages arising from death by wrongful act. When any collector or personal representative of an estate has published or mailed the notice provided for by this section, no further publication or mailing shall be required by any other collector or personal representative.

(b) Prior to filing the proof of notice required by G.S. 28A-14-2, every personal representative and collector shall personally deliver or send by first class mail to the last known address a copy of the notice required by subsection (a) of this section to all persons, firms, and corporations having unsatisfied claims against the decedent who are actually known or can be reasonably ascertained by the personal representative or collector within 75 days after the granting of letters. Provided, however, no notice shall be required to be delivered or mailed with respect to any claim that is recognized as a valid claim by the personal representative or collector.

(c) The personal representative or collector may personally deliver or mail by first class mail a copy of the notice required by subsection (a) of this section to all creditors of the estate whose names and addresses can be ascertained with reasonable diligence. If the personal representative or collector in good faith believes that the notice required by subsection (b) of this section to a particular creditor is or may be required and gives notice based on that belief, the personal representative or collector is not liable to any person for giving the notice, whether or not the notice is actually required by subsection (b) of this section. If the personal representative or collector in good faith fails to give notice required by subsection (b) of this section, the personal representative or collector is not liable to any person for such failure. (1868-9, c. 113, s. 29; 1881, c. 278, s. 2; Code, ss. 1421, 1422; Rev., s. 39; C.S., s. 45; 1945, c. 635; 1949, c. 47; c. 63, s. 1; 1955, c. 625; 1961, c. 26, s. 1; c. 741, s. 1; 1973, c. 1329, s. 3; 1977, c. 446, s. 1; 1985, c. 319; 1987 (Reg. Sess., 1988), c. 1077, s. 1; 1989, c. 378, s. 1; c. 770, s. 8; 1991, c. 282, s. 1.)

Legal Periodicals. — For article, "Notice to Creditors in Estate Proceedings: What Process Is Due?", see 63 N.C.L. Rev. 659 (1985).

CASE NOTES

Quoted in Lassiter v. Faison, 111 N.C. App. 206, 432 S.E.2d 373 (1993).

§ 28A-14-1.1. Validation of certain notices.

(a) Any notice to creditors published or posted under G.S. 28A-14-1 which did not, in the advertisement, name the day after which claims could not be presented is validated.

(b) This section applies to all notices published and posted between October 1, 1975, and January 1, 1991, except that it does not affect any pending litigation or any litigation instituted within 90 days of January 1, 1991. (1981, c. 96, ss. 1, 2; 1987, c. 277, s. 8; 1989, c. 390, s. 8; 1991, c. 489, s. 8.)

Editor's Note. — Session Laws 1987, c. 277, which amended this section, in s. 11 provided: "This act is effective upon ratification [June 4, 1987], except for Sections 10 and 11 which are effective July 1, 1987, and shall not affect pending litigation."

§ 28A-14-2. Proof of notice.

A copy of the notice directed by G.S. 28A-14-1(a) to be posted or published, together with an affidavit or affidavits of one of the persons authorized by G.S. 1-600(a) to make affidavits to the effect that such notice was posted or published in accordance with G.S. 28A-14-1(a), and an affidavit of the personal representative or collector, or the attorney for the personal representative or collector, to the effect that a copy of the notice was personally delivered or mailed to each creditor entitled to notice in accordance with G.S. 28A-14-1(b) shall be filed in the office of the clerk of superior court by the personal representative or collector at the time the inventory required by G.S. 28A-20-1 is filed. The copy of the notice, together with the affidavit or affidavits, shall be deemed a record of the court and a copy thereof, duly certified by the clerk of superior court, shall be received as prima facie evidence of the fact of publication or mailing in all the courts of this State. (1868-9, c. 113, s. 31; Code, s. 1423; Rev., s. 40; C.S., s. 46; 1951, c. 1005, s. 3; 1961, c. 26, s. 2; 1973, c. 1329, s. 3; 1987 (Reg. Sess., 1988), c. 1077, s. 2; 1989, c. 378, s. 2.)

ARTICLE 15.

Assets; Discovery of Assets.

§ 28A-15-1. Assets of the estate generally.

(a) All of the real and personal property, both legal and equitable, of a decedent shall be assets available for the discharge of debts and other claims against his estate in the absence of a statute expressly excluding any such property. Provided that before real property is selected the personal representative must determine that such selection is in the best interest of the administration of the estate.

(b) In determining what property of the estate shall be sold, leased, pledged, mortgaged or exchanged for the payment of the debts of the decedent and other claims against his estate, the personal representative shall select the assets which in his judgment are calculated to promote the best interests of the estate. In the selection of assets for this purpose, there shall be no necessary distinction between real and personal property, absent any contrary provision in the will.

(c) If it shall be determined by the personal representative that it is in the best interest of the administration of the estate to sell, lease, or mortgage any real estate or interest therein to obtain money for the payment of debts and other claims against the decedent's estate, the personal representative shall institute a special proceeding before the clerk of superior court for such purpose pursuant to Article 17 of this Chapter, except that no such proceeding shall be required for a sale made pursuant to authority given by will. A general provision granting authority to the personal representative to sell the testator's real property, or incorporation by reference of the provisions of G.S. 32-27(2) shall be sufficient to eliminate the necessity for a proceeding under Article 17.

(d) The crops of every deceased person, remaining ungathered at his death, shall, in all cases, belong to the personal representative or collector, as part of the personal assets of the decedent's estate; and shall not pass to the devisee by virtue of any devise of the land, unless such intent be manifest and specified in the will. (1868-9, c. 113, ss. 14, 15; Code, ss. 1406, 1407; Rev., ss. 45, 47; C.S., ss. 52, 54; 1973, c. 1329, s. 3; 1975, c. 300, s. 5; 1985, c. 426.)

CASE NOTES

Ownership of Note upon Death of Joint Payee. — Promissory note payable only to testator and his wife did not become part of testator's estate but became the sole property of testator's wife upon his death; therefore, son would not inherit. Miller v. Miller, 117 N.C. App. 71, 450 S.E.2d 15 (1994).

Quoted in Matthews v. Watkins, 91 N.C. App. 640, 373 S.E.2d 133 (1988).

Cited in Sisson v. Campbell Univ., Inc., 688 F. Supp. 1064 (E.D.N.C. 1988).

§ 28A-15-2. Title and possession of property.

CASE NOTES

Vesting of Real Property in Heirs. — When a property owner dies intestate, the title to his real property vests immediately in his heirs. The decedent's personal representative has the power, upon petition to the clerk of superior court, to sell decedent's real property for payments of debts and other claims against the decedent's estate, but the proceeding is an adversary one, requiring that the heirs be made parties. If an heir is not joined, the order of sale is void as to him. Swindell v. Lewis, 82 N.C. App. 423, 346 S.E.2d 237 (1986).

Heirs of wife's deceased husband were necessary parties to equitable distribution action in which husband's administrator had been substituted as defendant, and they were properly added as parties defendant. Swindell v. Lewis, 82 N.C. App. 423, 346 S.E.2d 237 (1986).

Stated in Matthews v. Watkins, 91 N.C. App. 640, 373 S.E.2d 133 (1988).

§ 28A-15-5. Order in which assets appropriated; abatement.

CASE NOTES

Bequest Not Adeemed by Sale During Testator's Incompetency. — Where the trial court found that testator specifically bequeathed his interest in livestock to his daughter, and subsequently became incompetent and did not regain his competency at any time before his death, and where his interest in livestock was sold by his trustees for $22,543.48, and those funds were included in the assets coming into the hands of the executor, and moreover, where there were sufficient assets in the estate to satisfy all of its obligations as well as all general, specific and demonstrative devises without any abatement of those devises, these findings were sufficient to support the court's conclusion that testator's specific testamentary gift of his interest in livestock to his daughter was not adeemed by the trustee's sale thereof during testator's incompetency before his death. In re Estate of Warren, 81 N.C. App. 634, 344 S.E.2d 795 (1986).

§ 28A-15-6. Federal income tax refunds — joint returns.

CASE NOTES

Applied in Brantley v. Watson, 115 N.C. App. 393, 445 S.E.2d 53 (1994).

§ 28A-15-9. Excess funds.

CASE NOTES

Applied in Brantley v. Watson, 115 N.C. App. 393, 445 S.E.2d 53 (1994).

§ 28A-15-10. Assets of decedent's estate for limited purposes.

CASE NOTES

Cited in In re Estate of Francis, 327 N.C. 101, 394 S.E.2d 150 (1990).

§ 28A-15-12. Examination of persons or corporations believed to have possession of property of decedent.

CASE NOTES

Attorneys' fees were recoverable by administrators of decedent's estate, as successful parties, in suit by administrators to compel decedent's son to provide an accounting of certain estate property. In re Estate of Katsos, 84 N.C. App. 682, 353 S.E.2d 677, cert. denied, 320 N.C. 169, 358 S.E.2d 52 (1987).

Cited in Sisson v. Campbell Univ., Inc., 688 F. Supp. 1064 (E.D.N.C. 1988).

ARTICLE 17.

Sales, Leases or Mortgages of Real Property.

§ 28A-17-1. Sales of real property.

CASE NOTES

I. General Consideration.
II. Practice and Procedure.

I. GENERAL CONSIDERATION.

Vesting of Real Property in Heirs. — When a property owner dies intestate, the title to his real property vests immediately in his heirs. The decedent's personal representative has the power, upon petition to the clerk of superior court, to sell decedent's real property for payments of debts and other claims against the decedent's estate, but the proceeding is an adversary one, requiring that the heirs be made parties. If an heir is not joined, the order of sale is void as to him. Swindell v. Lewis, 82 N.C. App. 423, 346 S.E.2d 237 (1986).

II. PRACTICE AND PROCEDURE.

Heirs of wife's deceased husband were necessary parties to equitable distribution action in which husband's administrator had been substituted as defendant, and they were properly added as parties defendant. Swindell v. Lewis, 82 N.C. App. 423, 346 S.E.2d 237 (1986).

§ 28A-17-4. Heirs and devisees necessary parties.

CASE NOTES

Vesting of Real Property in Heirs. — When a property owner dies intestate, the title to his real property vests immediately in his heirs. The decedent's personal representative has the power, upon petition to the clerk of superior court, to sell decedent's real property for payments of debts and other claims against the decedent's estate, but the proceeding is an adversary one, requiring that the heirs be made parties. If an heir is not joined, the order of sale is void as to him. Swindell v. Lewis, 82 N.C. App. 423, 346 S.E.2d 237 (1986).

Heirs of wife's deceased husband were necessary parties to equitable distribution action in which husband's administrator had been substituted as defendant, and they were properly added as parties defendant. Swindell v. Lewis, 82 N.C. App. 423, 346 S.E.2d 237 (1986).

ARTICLE 18.

Actions and Proceedings.

§ 28A-18-1. Survival of actions to and against personal representative.

CASE NOTES

I. General Consideration.
II. Revival and Survival of Actions.

I. GENERAL CONSIDERATION.

This section clearly manifests, etc. —

In accord with the main volume. See Brace v. Strother, 90 N.C. App. 357, 368 S.E.2d 447, cert. denied, 323 N.C. 171, 373 S.E.2d 104 (1988).

Limitation for Wrongful Death Action Based on Medical Malpractice Not Extended by § 1-15(c). — Section 1-15(c) would not apply to extend statute of limitations for plaintiff bringing action for wrongful death based on alleged acts of medical malpractice; plaintiff was required to bring her wrongful death claim within two years of deceased's death, pursuant to § 1-53(4). King v. Cape Fear Mem. Hosp., 96 N.C. App. 338, 385 S.E.2d 812, cert. denied, 326 N.C. 265, 389 S.E.2d 114 (1990).

A viable fetus is a "person" under the Wrongful Death Act and the estate of such a person may bring an action for damages. Greer v. Parsons, 103 N.C. App. 463, 405 S.E.2d 921, aff'd, 331 N.C. 368, 416 S.E.2d 174 (1992).

Action by the personal representative of deceased stillborn child was not barred by the release executed by child's parents, as the release by its terms bound only themselves and their heirs and assigns as to their personal claims and did not purport to settle or affect a claim for the child's wrongful death, and since under North Carolina law the parents, though the child's next of kin, had no authority to either assert or settle a claim for the child's wrongful death; only the child's personal representative had that authority. Greer v. Parsons, 103 N.C. App. 463, 405 S.E.2d 921, aff'd, 331 N.C. 368, 416 S.E.2d 174 (1992).

Action Properly Dismissed Against Defendants Who Were Merely Collectors by Affidavit. — Where plaintiff was required by this statute to bring his action against the collector or personal representative, his action was properly dismissed when he filed his action against defendants who were merely collectors by affidavit under § 28A-25-1, since plaintiff failed to bring his action against the proper party or parties. Brace v. Strother, 90 N.C. App. 357, 368 S.E.2d 447, cert. denied, 323 N.C. 171, 373 S.E.2d 104 (1988).

Applied in McGowen v. Rental Tool Co., 109 N.C. App. 688, 428 S.E.2d 275 (1993).

Cited in Clark v. Inn W., 324 N.C. 415, 379 S.E.2d 23 (1989); Turner v. Duke Univ., 325 N.C. 152, 381 S.E.2d 706 (1989); Caldwell v. Caldwell, 103 N.C. App. 380, 405 S.E.2d 588 (1991); Greer v. Parsons, 331 N.C. 368, 416 S.E.2d 174 (1992); McInnis v. Provident Life & Accident Ins. Co., 21 F.3d 586 (4th Cir. 1994); Ragan v. Hill, 337 N.C. 667, 447 S.E.2d 371 (1994).

II. REVIVAL AND SURVIVAL OF ACTIONS.

Action for Divorce Did Not Survive Husband's Death. — Trial court did not err in dismissing husband's action for divorce and wife's counterclaim for equitable distribution where husband died before decree of absolute divorce was granted. Caldwell v. Caldwell, 93 N.C. App. 740, 379 S.E.2d 271, cert. denied, 325 N.C. 270, 384 S.E.2d 513 (1989).

Action Under Tort Claims Act. — Recovery against the county board of education pursuant to the North Carolina Tort Claims Act did not bar plaintiff's claims against the individual bus driver who caused the wreck, or plaintiff's uninsured motorist/underinsured motorist (UM/UIM) carrier for damages in excess of the maximum recovery allowable under the Tort Claims Act. Oakley v. Thomas, 112 N.C. App. 130, 434 S.E.2d 663 (1993).

§ 28A-18-2. Death by wrongful act of another; recovery not assets.

(a) When the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured person had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their personal representatives or collectors, shall be liable to an action for damages, to be brought by the personal representative or collector of the decedent; and this notwithstanding the death, and although the wrongful act, neglect or default, causing the death, amounts in law to a felony. The personal representative or collector of the decedent who pursues an action under this section may pay from the assets of the estate the reasonable and necessary expenses, not including attorneys' fees, incurred in pursuing the action. At the termination of the action, any amount recovered shall be applied first to the reimbursement of the estate for the expenses incurred in pursuing the action, then to the payment of attorneys' fees, and shall then be distributed as provided in this section. The amount recovered in such action is not liable to be applied as assets, in the payment of debts or legacies, except as to burial expenses of the deceased, and reasonable hospital and medical expenses not exceeding four thousand five hundred dollars ($4,500) incident to the injury resulting in death, except that the amount applied for hospital and medical expenses shall not exceed fifty percent (50%) of the amount of damages recovered after deducting attorneys' fees. All claims filed for such services shall be approved by the clerk of the superior court and any party adversely affected by any decision of said clerk as to said claim may appeal to the superior court in term time, but shall be disposed of as provided in the Intestate Succession Act.

(b) Damages recoverable for death by wrongful act include:

(1) Expenses for care, treatment and hospitalization incident to the injury resulting in death;

(2) Compensation for pain and suffering of the decedent;

(3) The reasonable funeral expenses of the decedent;

(4) The present monetary value of the decedent to the persons entitled to receive the damages recovered, including but not limited to compensation for the loss of the reasonably expected;

  a. Net income of the decedent,

  b. Services, protection, care and assistance of the decedent, whether voluntary or obligatory, to the persons entitled to the damages recovered,

  c. Society, companionship, comfort, guidance, kindly offices and advice of the decedent to the persons entitled to the damages recovered;

(5) Such punitive damages as the decedent could have recovered pursuant to Chapter 1D of the General Statutes had he survived, and punitive damages for wrongfully causing the death of the decedent through malice or willful or wanton conduct, as defined in G.S. 1D-5;

(6) Nominal damages when the jury so finds.

(c) All evidence which reasonably tends to establish any of the elements of damages included in subsection (b), or otherwise reasonably tends to establish the present monetary value of the decedent to the persons entitled to receive the damages recovered, is admissible in an action for damages for death by wrongful act.

(d) In all actions brought under this section the dying declarations of the deceased shall be admissible as provided for in G.S. 8-51.1. (R.C., c. 1, s. 10; c. 46, ss. 8, 9; 1868-9, c. 113, ss. 70-72, 115; Code, ss. 1498-1500; Rev., ss. 59, 60; 1919, c. 29; C.S., ss. 160, 161; 1933, c. 113; 1951, c. 246, s. 1; 1959, c. 879, s. 9; c. 1136; 1969, c. 215; 1973, c. 464, s. 2; c. 1329, s. 3; 1981, c. 468; 1985, c. 625; 1993, c. 299, s. 1; 1995, c. 514, s. 2.)

Editor's Note. — Session Laws 1995, c. 514, s. 4, is a severability clause.

Effect of Amendments. — The 1995 amendment, effective January 1, 1996, and applicable to claims for relief arising on or after that date, in subdivision (b)(5) added "pursuant to Chapter 1D of the General Statutes", and substituted "malice or willful or wanton conduct, as defined in G.S. 1D-5" for "maliciousness, wilful or wanton injury, or gross negligence".

Legal Periodicals. —

For article, "Legal Implications of Human in Vitro Fertilization for the Practicing Physician in North Carolina," see 6 Campbell L. Rev. 5 (1984).

For article, "Economic Valuation for Wrongful Death," see 6 Campbell L. Rev. 47 (1984).

For note on use of the family purpose doctrine when no outsiders are involved, in light of Carver v. Carver, 310 N.C. 669, 314 S.E.2d 739 (1984), see 21 Wake Forest L. Rev. 243 (1985).

For comment, "Wrong Without a Remedy—North Carolina and the Wrongful Death of a Stillborn," see 9 Campbell L. Rev. 93 (1986).

For note discussing the appointment of an administrator for a decedent's estate to create diversity of citizenship, see 21 Wake Forest L. Rev. 489 (1986).

For note discussing wrongful death recovery for a viable unborn fetus, in light of DiDonato v. Wortman, 80 N.C. App. 117, 341 S.E.2d 58 (1986), see 16 N.C. Cent. L.J. 207 (1987).

For note on the wrongful death of a viable fetus in North Carolina, see 66 N.C.L. Rev. 1291 (1988).

For note on the expansion of the viable fetus wrongful death action, see 11 Campbell L. Rev. 91 (1988).

For note on the wrongful death of a viable fetus, see 23 Wake Forest L. Rev. 849 (1988).

For note, "Examining DiDonato Damage Limitation and Mandatory Joinder Requirements — Greer v. Parsons," see 15 Campbell L. Rev. 97 (1992).

CASE NOTES

I. General Consideration.
III. Parties to the Action.
IV. Distribution of Recovery.
V. Damages Recoverable.
  A. In General.
  B. Pain and Suffering.
  C. Burial Expenses.
  D. Loss of Decedent's Income, Services, Society, etc.
  E. Punitive Damages.

I. GENERAL CONSIDERATION.

Editor's Note. — *Most of the cases below were decided prior to the 1993 amendment, which raised to $4,500 the limit on the amount recovered in a wrongful death action that is liable for the payment of hospital and medical expenses of the decedent.*

Annotations in the main volume under analysis line I, "General Consideration," and catchlined "Person in former § 28-173, etc." and "For case calling for legislative action, etc." should be read in light of DiDonato v. Wortman, 320 N.C. 423, 358 S.E.2d 489 (1987), which held that this section allows recovery for the wrongful death of a viable but unborn child.

Preemption. — Where decedent was killed in automobile accident, Employee Retirement Income Security Act (ERISA) preempted the operation of North Carolina's wrongful death statute to the extent that the state law precluded operation of the terms of the "Acts of Third Parties" clause in the plan requiring reimbursement to plan. McInnis v. Provident Life & Accident Ins. Co., 21 F.3d 586 (4th Cir. 1994).

Application of Section to Actions Pursuant to 42 U.S.C. § 1983. — There is no federal statutory law governing the measure of damages in wrongful death actions brought pursuant to 42 USC § 1983, and, therefore, 42 USC § 1988 compels the use of the law of North Carolina: namely, this section. Bowling v. Oldham, 753 F. Supp. 588 (M.D.N.C. 1990).

The North Carolina wrongful death statute satisfies the two underlying policies of 42 U.S.C. § 1983, as it provides adequate relief for the estate of the deceased, and satisfies the policy of preventing abuses of power by state officials by the availability of punitive damages. Bowling v. Oldham, 753 F. Supp. 588 (M.D.N.C. 1990).

Municipalities Not Exempt from Section. — The plain, positive provisions of this section contain no basis for supposing that the Legislature intended to exempt municipalities therefrom. Jackson v. Housing Auth., 73 N.C. App. 363, 326 S.E.2d 295 (1985), aff'd, 316 N.C. 259, 341 S.E.2d 523 (1986).

Section Encompasses Loss of Consortium Claims. — The trial court properly dismissed plaintiff's claim brought in her individual capacity for loss of consortium based on the ground that the wrongful death statute encompasses loss of consortium claims, and any common law claim encompassed by the wrongful death statute should have been asserted under this section by the personal representative for the deceased. Keys v. Duke Univ., 112 N.C. App. 518, 435 S.E.2d 820 (1993).

The tort claim for "loss of consortium", no matter what damages may be recovered thereunder, is covered under the wrongful death statute, and plaintiff could not, therefore, bring an independent claim for loss of consortium in her action asserting a claim for wrongful death. Keys v. Duke Univ., 112 N.C. App. 518, 435 S.E.2d 820 (1993).

Negligence Per Se. — Trial court did not err in admitting testimony that decedent did not have motorcycle endorsement at time of accident. Violation of § 20-7 is negligence per se. Ward v. McDonald, 100 N.C. App. 359, 396 S.E.2d 337 (1990).

Gross negligence is "something less than willful and wanton conduct," and includes "the absence of even slight care," "indifference to the rights and welfare of others," "negligence of an aggravated character." Cowan v. Brian Ctr. Mgt. Corp., 109 N.C. App. 443, 428 S.E.2d 263 (1993).

Child Not a "Trespasser." — Child who was electrocuted when he entered power company's cabinet containing high voltage wires located on property on which the company had an easement, who had permission of the landowners to play on the property, was not a trespasser as that term has been defined by our case law, and thus the power company was not entitled to have its legal duty reduced. Cole v. Duke Power Co., 81 N.C. App. 213, 344 S.E.2d 130, cert. denied, 318 N.C. 281, 347 S.E.2d 462 (1986).

Joinder of Action for Wrongful Death of Viable Fetus. — The action for wrongful death of a viable fetus must be joined with any action based on the same facts brought by the decedent's parents. DiDonato v. Wortman, 320 N.C. 423, 358 S.E.2d 489, rehearing denied, 320 N.C. 799, 361 S.E.2d 73 (1987), reversing DiDonato v. Wortman, 80 N.C. App. 117, 341 S.E.2d 58 (1986).

Lack of Administrator for Fetus's Estate Not Grounds for Dismissal Where Clerk Unwilling to Issue Letters of Administration. — Cause of action for the wrongful death of the fetus was not subject to dismissal on grounds that it was not brought by the personal representative of the deceased as required by subsection (a), where the failure to bring this action in the name of the administrator of the estate was apparently due to the unwillingness of the clerk of court to issue letters of administration for a fetus's "estate." The existence of a cause of action for wrongful death is sufficient for the appointment of an administrator, and since a wrongful death action exists for a viable fetus, the clerk should have appointed an administrator to bring the action. Ledford v. Martin, 87 N.C. App. 279, 359 S.E.2d 505 (1987), cert. denied, 321 N.C. 473, 365 S.E.2d 1 (1988), overruled on other grounds, Johnson v. Ruark Obstetrics, 327 N.C. 283, 395 S.E.2d 85 (1990).

If an employee's action would be barred by the Workers' Compensation Act, then a wrongful death action brought by the employee's representative is also barred. McAllister v. Cone Mills Corp., 88 N.C. App. 577, 364 S.E.2d 186 (1988).

Complaint Barred by Workers' Compensation Act. — Wrongful death complaint alleging that defendant, decedent's employer, negligently required decedent to perform tasks which exposed decedent to known carcinogens, thereby causing decedent's cancer of the bladder and resulting death, came within the language of § 97-53(13) and was barred by the Workers' Compensation Act. McAllister v. Cone Mills Corp., 88 N.C. App. 577, 364 S.E.2d 186 (1988).

Claim Against Provider of Alcohol Barred by Decedent's Negligence. — Plaintiff's wrongful death claim against a provider of alcohol alleging wilful and wanton negligence for serving the visibly intoxicated decedent alcohol after being requested to refrain from serving him was barred by the decedent's own actions in driving his vehicle while highly intoxicated. Sorrells v. M.Y.B. Hospitality Ventures, 332 N.C. 645, 423 S.E.2d 72 (1992).

Action Not Maintained Since Children Could Not Have Recovered For Injuries If They Had Lived. — The cause of action for the children's wrongful death, where the children were killed by their mother and her boyfriend as they were fleeing from police shortly before the truck they were in was blown up during the course of a gun battle and high speed chase with police, could not be maintained because the children could not have recovered for their injuries if they had lived, and the first requisite of a wrongful death action in this State is that the decedent could have recovered for his injuries if he had lived. Lynch v. North Carolina Dep't of Justice, 93 N.C. App. 57, 376 S.E.2d 247 (1989).

Action Against Pharmacist. — While a pharmacist has no duty to advise absent knowledge of the circumstances, once a pharmacist is alerted to specific facts and he or she undertakes to advise a customer, the pharmacist then has a duty to advise correctly; therefore, where plaintiff alleged, among other things, that her decedent "sought out and was relying upon the skill, judgment and expertise of defendant with respect to the safety of taking the drug Indocin given the fact that plaintiff's intestate suffered the aforementioned medical condition," she stated a claim upon which relief could be granted. Ferguson v. Williams, 92 N.C. App. 336, 374 S.E.2d 438 (1988).

Payment of Expenses of Suit from Assets of Estates. — With the 1985 amendment of subsection (a) of this section, the Legislature has chosen to allow reasonable and necessary expenses, excluding attorneys' fees, incurred in pursuing a wrongful death action to be paid from the assets of the deceased's estate. If there is any recovery from the wrongful death action, the recovery must first be applied to reimburse the estate for the expenses paid from its assets in pursuing the action. In re Estate of Proctor, 79 N.C. App. 646, 340 S.E.2d 138 (1986).

Prior to the 1985 amendment to subsection (a) of this section, there was no statutory authority for paying out of a decedent's estate the reasonable and necessary expenses incurred in pursuing a wrongful death action. Thus, on February 1, 1985, clerk properly denied petition seeking authorization of payment of litigation expenses out of decedent's estate, and superior court was correct in affirming the clerk's order. However, following the July 5, 1985 amendment there was nothing to prevent decedent's personal representatives from filing a new petition seeking to have those same expenses paid from the deceased's estate. In re Estate of Proctor, 79 N.C. App. 646, 340 S.E.2d 138 (1986).

Contributory negligence of decedent, who was operating his vehicle in an impaired condition in violation of § 20-138.1, was a defense to a wrongful death claim under this section based on defendants' alleged negligence in selling alcohol to an intoxicated person. Clark v. Inn W., 89 N.C. App. 275, 365 S.E.2d 682, rev'd on other grounds, 324 N.C. App. 415, 379 S.E.2d 23 (1989).

Applied in Williams v. Odell, 90 N.C. App. 699, 370 S.E.2d 62 (1988); Ward v. McDonald, 100 N.C. App. 359, 396 S.E.2d 337 (1990).

Stated in Horne v. Owens-Corning Fiberglas Corp., 4 F.3d 276 (4th Cir. 1993).

Cited in McDowell v. Estate of Anderson, 69 N.C. App. 725, 318 S.E.2d 258 (1984); In re Ragan, 64 Bankr. 384 (Bankr. E.D.N.C. 1986); Woodson v. Rowland, 92 N.C. App. 38, 373 S.E.2d 674 (1988); State v. Beale, 324 N.C. 87, 376 S.E.2d 1 (1989); Clark v. Inn W., 324 N.C. 415, 379 S.E.2d 23 (1989); Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991); Greer v. Parsons, 331 N.C. 368, 416 S.E.2d 174 (1992); Westinghouse v. Hair, 107 N.C. App. 106, 418 S.E.2d 532 (1992); Doe v. American Nat'l Red Cross, 837 F. Supp. 121 (E.D.N.C. 1992).

III. PARTIES TO THE ACTION.

Editor's Note. — *Annotations in the main volume under analysis line III, "Parties to the Action," and catchlined "Prenatal Death of Viable Child," should* *be read in light of DiDonato v. Wortman, 320 N.C. 423, 358 S.E.2d 489 (1987), which held that this section allows recovery for the wrongful death of a viable but unborn child.*

Nor parent for death of child. — Action by the personal representative of deceased stillborn child was not barred by the release executed by child's parents, as the release by its terms bound only themselves and their heirs and assigns as to their personal claims and did not purport to settle or affect a claim for the child's wrongful death, and since under North Carolina law the parents, though the child's next of kin, had no authority to either assert or settle a claim for the child's wrongful death; only the child's personal representative had that authority. Greer v. Parsons, 103 N.C. App. 463, 405 S.E.2d 921, aff'd, 331 N.C. 368, 416 S.E.2d 174 (1992).

Prenatal Death of Viable Child. — This section allows recovery for the death of a viable but unborn child. DiDonato v. Wortman, 320 N.C. 423, 358 S.E.2d 489, rehearing denied, 320 N.C. 799, 361 S.E.2d 73 (1987), reversing DiDonato v. Wortman, 80 N.C. App. 117, 341 S.E.2d 58 (1986).

The Supreme Court's holding in DiDonato v. Wortman, 320 N.C. 423, 358 S.E.2d 489 (1987), permitting an action to recover for the destruction of a viable fetus en ventre sa mere, could be applied retroactively to an action commenced before DiDonato was decided. Johnson v. Ruark Obstetrics & Gynecology Assocs., 89 N.C. App. 154, 365 S.E.2d 909 (1988), aff'd, 327 N.C. 283, 395 S.E.2d 85 (1990).

The definition of "viability" intended by the Supreme Court in DiDonato v. Wortman, 320 N.C. 423, 358 S.E.2d 489 (1987), is simply the common law definition of fetal capability to live independently of the mother. Although there is apparently no clear medical consensus as to the specific gestational age at which this capability is currently achieved, a gestational range of 20 to 26 weeks has been suggested. However, the determination of a fetus's viability is a question of fact. Johnson v. Ruark Obstetrics & Gynecology Assocs., 89 N.C. App. 154, 365 S.E.2d 909 (1988), aff'd, 327 N.C. 283, 395 S.E.2d 85 (1990).

A wrongful death action may be maintained against a municipal corporation. Jackson v. Housing Auth., 316 N.C. 259, 341 S.E.2d 523 (1986).

Actions Against County Employees. — Plaintiff's complaint, claiming that social services employees defendants' negligent failure to investigate claims of child abuse and neglect, coupled with their failure to remove her son from the custody of his abusive father caused her son's death, contained allegations pertaining only to the defendants' actions or inactions in their official capacities with county department of social services and that defendants were entitled to judgment based on governmental immunity. Whitaker v. Clark, 109 N.C. App. 379, 427 S.E.2d 142 (1993), cert. denied, 333 N.C. 795, 431 S.E.2d 31 (1993).

IV. DISTRIBUTION OF RECOVERY.

Editor's Note. *— The annotations to the case of Crawford v. Hudson, 3 N.C. App. 555, 165 S.E.2d 557 (1969), appearing under this analysis line on pages 87 to 89 of the main volume, should be disregarded.*

Attorneys' Fees. — The 1985 amendment to this section provides that an attorney who litigates a wrongful death claim may be paid for his services from the wrongful death proceeds. In re Lessard, 78 N.C. App. 196, 336 S.E.2d 712 (1985).

Attorney who neither initiated nor handled wrongful death claim and was appointed successor administrator only after wrongful death award had been made, but who expended considerable time in determining the correct distribution of wrongful death proceeds, could be compensated for his services from the wrongful death proceeds. In re Lessard, 78 N.C. App. 196, 336 S.E.2d 712 (1985).

"Costs" of an estate would not be payable from wrongful death proceeds. In re Lessard, 78 N.C. App. 196, 336 S.E.2d 712 (1985).

V. DAMAGES RECOVERABLE.

A. In General.

Editor's Note. *— The annotation in the main volume under analysis line V A, "Damages Recoverable, In General," and catchlined "Prenatal Death of Viable Child," should be read in light of DiDonato v. Wortman, 320 N.C. 423, 358 S.E.2d 489 (1987), which held that this section allows recovery for the wrongful death of a viable but unborn child.*

Basis for Damages Generally. — This section allows the personal representative, on behalf of the statutory beneficiaries of the estate, to recover, inter alia, the present monetary value of the decedent to the beneficiaries. The measure is the worth of the decedent; how well off the beneficiaries are absent the decedent is immaterial. Harris v. United States, 121 F.R.D. 652 (W.D.N.C. 1988).

Question as to Economic Loss to Estate Not Error. — Where plaintiff's lawyer asked doctor "Do you have an opinion as to the present value of the economic loss to the estate?", defendant was correct in pointing out that recovery of damages under the statute is to the beneficiaries of the decedent and not to the decedent's estate; however, it was plain from the record that both doctor and the jury understood the correct measurement of damages under the wrongful death statute. Stutts v. Adair, 94 N.C. App. 227, 380 S.E.2d 411 (1989).

Negative Factors Held Relevant to Present Monetary Value. — Evidence regarding 19 year old decedent's low level of educational attainment, absence of regular employment, status of dependency on her parents, and history of alcohol and drug abuse was clearly relevant to a determination of her "present monetary value ... to the persons entitled to receive the damages recovered," and the jury could conclude that these negative factors offset, to the extent found, what decedent's present monetary value would have been in their absence. Pearce v. Fletcher, 74 N.C. App. 543, 328 S.E.2d 889 (1985), upholding award of damages in the amount of $5,000.

Under Subsection (b)(4), only reasonably expected net income of decedent can be recovered. Victim's parents, his only survivors, could only recover the amount of his income that they reasonably might have received had he lived. State v. Smith, 90 N.C. App. 161, 368 S.E.2d 33 (1988), aff'd, 323 N.C. 703, 374 S.E.2d 866, cert. denied, 490 U.S. 1100, 109 S. Ct. 2453, 104 L. Ed. 2d 1007 (1989).

Trial Court Erred in Application of This Section. — Although the trial court properly used the wrongful death statute to compute the amount of restitution which defendant found guilty of misdemeanor death by vehicle should pay, it erred in its application of this section. State v. Smith, 90 N.C. App. 161, 368 S.E.2d 33 (1988), aff'd, 323 N.C. 703, 374 S.E.2d 866, cert. denied, 490 U.S. 1100, 109 S. Ct. 2453, 104 L. Ed. 2d 1007 (1989).

Certain increased medical expenses as well as funeral bills incident to the death of a 40 week-old fetus could only be recovered by the administrator of the fetal estate pursuant to an action under this section. Johnson v. Ruark Obstetrics & Gynecology Assocs., 89 N.C. App. 154, 365 S.E.2d 909 (1988), aff'd, 327 N.C. 283, 395 S.E.2d 85 (1990), rehearing denied, 327 N.C. 644, 399 S.E.2d 133 (1990).

Hedonic damages are not recoverable under subdivision (b) of this section. Livingston v. United States, 817 F. Supp. 601 (E.D.N.C. 1993).

Trial Court Should Submit to Jury Separate Issues for Compensatory and Punitive Damages. — In wrongful death action, trial court should submit to jury separate issues for compensatory and punitive damages when evidence supports submission of these issues. Jones v. McCaskill, 99 N.C. App. 764, 394 S.E.2d 254 (1990).

Double Recovery Not Permitted. — Because recovery for any diminishment in the quality of life of the survivors in a wrongful death case is already addressed in effect under subdivisions (b)(4)b and (b)(4)c, allowance of separate hedonic damages would result in double recovery. Livingston v. United States, 817 F. Supp. 601 (E.D.N.C. 1993).

Relevant Evidence. — Evidence pertaining to disease of plaintiff's decedent and the effect it had on his relationship with his parents had a tendency to prove the extent of damages, which were in controversy in wrongful death action. The evidence was therefore relevant and should have been admitted on that ground. Hales v. Thompson, 111 N.C. App. 350, 432 S.E.2d 388 (1993).

B. Pain and Suffering.

However, Decedent Must Have Been Conscious. — In an action under the Federal Tort Claims Act arising out of a vehicular accident, the extent of the accident inflicted massive head injuries making it improbable that the decedent was conscious following the collision, and therefore ruling out recovery for post-accident pain and suffering. Livingston v. United States, 817 F. Supp. 601 (E.D.N.C. 1993).

Damages for the pain and suffering of a decedent fetus are recoverable if they can be reasonably established. DiDonato v. Wortman, 320 N.C. 423, 358 S.E.2d 489, rehearing denied, 320 N.C. 799, 361 S.E.2d 73 (1987).

C. Burial Expenses.

Prenatal Death of Viable Child. — Medical and funeral expenses, as well as punitive and nominal damages, should be allowed in the case of a decedent fetus where appropriate. DiDonato v. Wortman, 320 N.C. 423, 358 S.E.2d 489, rehearing denied, 320 N.C. 799, 361 S.E.2d 73 (1987).

D. Loss of Decedent's Income, Services, Society, etc.

Prenatal Death of Viable Child. — Lost income damages normally available under subdivision (b)(4)a cannot be recovered in an action for the wrongful death of a stillborn child. DiDonato v. Wortman, 320 N.C. 423, 358 S.E.2d 489, rehearing denied, 320 N.C. 799, 361 S.E.2d 73 (1987).

Damages normally recovered under subdivision (b)(4)b and c, for loss of services, companionship, advice and the like, will not be available in an action for the wrongful death of a viable fetus. DiDonato v. Wortman, 320 N.C. 423, 358 S.E.2d 489, rehearing denied, 320 N.C. 799, 361 S.E.2d 73 (1987).

Loss of bloodline and denial of grandchildren are not grounds for recovery under this section. Livingston v. United States, 817 F. Supp. 601 (E.D.N.C. 1993).

Showing of Actual Support of Parents Not Required. — Trial judge did not err by instructing the jury that it could award damages to decedent's parents for the loss of her net income; there is no reason to demand actual support of the parents as the sole ground for any recovery of lost income since such a requirement would run counter to the remedial purpose of the statute and to the evidentiary provisions of subsection (c). Stutts v. Adair, 94 N.C. App. 227, 380 S.E.2d 411 (1989).

E. Punitive Damages.

Three Categories of Conduct Affording Recovery. — By providing for recovery of punitive damages upon a showing of "maliciousness, wilful or wanton injury, or gross negligence" it appears that the General Assembly intended to establish three separate categories of conduct which would afford a recovery. Cole v. Duke Power Co., 81 N.C. App. 213, 344 S.E.2d 130, cert. denied, 318 N.C. 281, 347 S.E.2d 462 (1986).

Recovery for Gross Negligence Even Absent Wilful or Wanton Conduct. — This section allows recovery of punitive damages in wrongful death actions involving gross negligence even when no wilful or wanton conduct was involved. To establish gross negligence, the plaintiff must show negligence of an aggravated character. Henderson v. LeBauer, 101 N.C. App. 255, 399 S.E.2d 142 (1991).

Gross Negligence, etc. —

In accord with second paragraph in the main volume. See Cole v. Duke Power Co., 81 N.C. App. 213, 344 S.E.2d 130, cert. denied, 318 N.C. 281, 347 S.E.2d 462 (1986).

Punitive damages are recoverable from municipalities in wrongful death cases on the same basis as from other tort-feasors. Jackson v. Housing Auth., 73 N.C. App. 363, 326 S.E.2d 295 (1985), aff'd, 316 N.C. 259, 341 S.E.2d 523 (1986).

Recovery from Municipal Corporations. — This section, the North Carolina Wrongful Death Act, contains a statutory provision providing for the recovery of punitive damages from bodies politic, which includes municipal corporations. Jackson v. Housing Auth., 316 N.C. 259, 341 S.E.2d 523 (1986).

When Directed Verdict Proper as to Claim for Punitive Damages. — In a wrongful death action arising out of negligence, a directed verdict may properly be granted against a plaintiff seeking punitive damages only where the evidence is insufficient as a matter of law to support a jury finding that the defendant wrongfully caused the death of the decedent in a malicious, wilful, wanton or grossly negligent manner. Boyd v. L.G. DeWitt Trucking Co., 103 N.C. App. 396, 405 S.E.2d 914, cert. denied, 330 N.C. 193, 412 S.E.2d 53 (1991).

Evidence Sufficient to Support Award of Punitive Damages. — Evidence of truck driver's driving record was sufficient for jury to find that trucker was an unsafe driver, that company for which he worked either knew or should have known of his danger to the rest of the driving public, and given the number and severity of his offense, was equally sufficient to support the jury's finding that company's negligent entrustment was wilful or wanton, so as to justify denial of defendants' motions for a directed verdict and for judgment notwithstanding the verdict on plaintiff's claim for punitive damages arising out of company's negligent entrustment. Boyd v. L.G. DeWitt Trucking Co., 103 N.C. App. 396, 405 S.E.2d 914, cert. denied, 330 N.C. 193, 412 S.E.2d 53 (1991).

Personal Representative's Claim Not Barred for Failure to Join with Parents. — Administratrix's claim for punitive damages for death of stillborn child was not barred merely because it was not joined with the settled claim of the parents; if defendants wished to allege that part of the moneys the parents received in settlement of their claims was for punitive damages, defendants would have a right to support that contention with evidence and have the jury consider it in evaluating the administratrix's claim for punitive damages. Greer v. Parsons, 103 N.C. App. 463, 405 S.E.2d 921, aff'd, 331 N.C. 368, 416 S.E.2d 174 (1992).

§ 28A-18-3. To sue or defend in representative capacity.

CASE NOTES

Cited in In re Lessard, 78 N.C. App. 196, 336 S.E.2d 712 (1985).

ARTICLE 19.

Claims against the Estate.

§ 28A-19-1. Manner of presentation of claims.

(a) A claim against a decedent's estate must be in writing and state the amount or item claimed, or other relief sought, the basis for the claim, and the name and address of the claimant; and must be presented by one of the following methods:

(1) By delivery in person or by mail to the personal representative, collector or clerk of superior court. Such claim will be deemed to have been presented from the time of such delivery.

(2) By mailing, registered or certified mail, return receipt requested, to the personal representative or collector at the address set out in the general notice to creditors. Such claim will be deemed to have been presented from the time when the return receipt is signed by the personal representative, collector, or his agent, or is refused by the personal representative, collector, or his agent.

(3) By delivery to the clerk of court of the county in which the estate is pending, which notice shall be filed in the appropriate estate file and copy mailed first class by the clerk of superior court at the expense of the claimant to the personal representative, collector, or his agent. The claim will be deemed to have been presented from the time of delivery to the clerk of court.

(b) In an action commenced after the death of the decedent against his personal representative or collector as such, the commencement of the action in the court in which such personal representative or collector qualified will constitute the presentation of a claim and no further presentation is necessary. In an action filed in any other court such claim will be deemed to have been presented at the time of the completion of service of process on such personal representative or collector.

(c) In an action pending against the decedent at the time of his death, which action survives at law, the substitution of the personal representative or collector for the decedent or motion therefor will constitute the presentation of a claim and no further presentation is necessary. Such claim will be deemed to have been presented from the time of the substitution, or motion therefor. (1973, c. 1329, s. 3; 1977, c. 446, s. 1; 1985, c. 645, s. 1.)

CASE NOTES

No Preemption by ERISA. — The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et seq., does not preempt this section and § 28A-19-3 in action by plaintiffs who challenged the acts of several defendants involving the seizure of surplus assets from a retirement plan and the use of an annuity backed by junk bonds to increase to monetary amount of the surplus seized. Riley v. Murdock, 828 F. Supp. 1215 (E.D.N.C. 1993).

Applied in In re Watson, 70 N.C. App. 120, 318 S.E.2d 544 (1984).

Cited in Ragan v. Hill, 337 N.C. 667, 447 S.E.2d 371 (1994).

§ 28A-19-3. Limitations on presentation of claims.

(a) All claims against a decedent's estate which arose before the death of the decedent, except contingent claims based on any warranty made in connection with the conveyance of real estate and claims of the United States and tax claims of the State of North Carolina and subdivisions thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, secured or unsecured, founded on contract, tort, or other legal basis, which are not presented to the personal representative or collector pursuant to G.S. 28A-19-1 by the date specified in the general notice to creditors as provided for in G.S. 28A-14-1(a) or in those cases requiring the delivery or mailing of notice as provided for in G.S. 28A-14-1(b), within 90 days after the date of the delivery or mailing of the notice if the expiration of said 90-day period is later than the date specified in the general notice to creditors, are forever barred against the estate, the personal representative, the collector, the heirs, and the devisees of the decedent. Provided further, if the expiration of said 90-day period is later than the date specified in the general notice to creditors, the notice delivered or mailed to each creditor, if any, shall be accompanied by a statement which specifies the deadline for filing the claim of the affected creditor.

(b) All claims against a decedent's estate which arise at or after the death of the decedent, except claims of the United States and tax claims of the State of North Carolina and subdivisions thereof whether due or to become due, absolute or contingent, liquidated or unliquidated, secured or unsecured, founded on contract, tort, or other legal basis are forever barred against the estate, the personal representative, the collector, the heirs, and the devisees of the decedent unless presented to the personal representative or collector as follows:

(1) With respect to any claim based on a contract with the personal representative or collector, within six months after the date on which performance by the personal representative or collector is due;

(2) With respect to any claim other than a claim based on a contract with the personal representative or collector, within six months after the date on which the claim arises.

(c) Except as otherwise provided by subsection (f) of this section, no claim shall be barred by the statute of limitations which was not barred thereby at the time of the decedent's death, if the claim is presented within the period provided by subsection (a) hereof.

(d) All claims of creditors upon whom there has been personal service of notice as provided in G.S. 28A-14-3 are forever barred unless presented to the personal representative or collector within the time and manner set out in this Article.

(e) Except as otherwise provided by subsection (f) of this section, unless a claim has been presented pursuant to G.S. 28A-19-1 giving notice of an action or special proceeding pending against a decedent at the time of his death and surviving under G.S. 28A-18-1 within the time provided by subsection (a) of this section, no recovery may be had upon any judgment obtained in any such action or proceeding against the estate, the personal representative, the collector, the heirs, and the devisees of the decedent.

(f) All claims barrable under the provisions of subsections (a) and (b) hereof shall, in any event, be barred if the first publication or posting of the general notice to creditors as provided for in G.S. 28A-14-1 does not occur within three years after the death of the decedent.

(g) Nothing in this section affects or prevents any action or proceeding to enforce any mortgage, deed of trust, pledge, lien (including judgment lien), or other security interest upon any property of the decedent's estate, but no deficiency judgment will be allowed if the provisions of this section are not complied with.

(h) The word "claim" as used in this section does not apply to claims of heirs or devisees to their respective shares or interests in the decedent's estate in their capacity as such heirs or devisees.

(i) Nothing in this section shall bar:

(1) Any claim alleging the liability of the decedent or personal representative; or

(2) Any proceeding or action to establish the liability of the decedent or personal representative; or

(3) The recovery on any judgment against the decedent or personal representative

to the extent that the decedent or personal representative is protected by insurance coverage with respect to such claim, proceeding or judgment or where there is underinsured or uninsured motorist coverage that might extend to such claim, proceeding, or judgment. (1973, c. 1329, s. 3; 1977, c. 446, s. 1; 1979, c. 509, s. 1; 1989, c. 378, s. 3; c. 485, s. 65.)

Editor's Note. —

Session Laws 1989, c. 485, s. 67, is a severability clause.

Legal Periodicals. —

For note on statute of limitations accrual in attorney malpractice actions, in light of Thorpe v. DeMent, 69 N.C. App. 355, 317 S.E.2d 692, aff'd per curiam, 312 N.C. 488, 322 S.E.2d 777 (1984), see 20 Wake Forest L. Rev. 1017 (1984).

CASE NOTES

Purpose. — This section is the type of statute that is commonly referred to as a "non-claim statute" and although similar to a statute of limitations, it serves a different purpose and operates independently of the statute of limitations that may also be applicable to a given claim. Ragan v. Hill, 337 N.C. 667, 447 S.E.2d 371 (1994).

Limitations on the filing of an action are applicable to statutes of limitations which restrict the assertion of legal rights to a specific time period in order to avoid stale claims, and a cause of action may be barred by this section, § 1-52(5), or both of these statutes. Ragan v. Hill, 337 N.C. 667, 447 S.E.2d 371 (1994).

No Preemption by ERISA. — The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et seq., does not preempt § 28A-19-1 and this section in action by plaintiffs who challenged the acts of several defendants involving the seizure of surplus assets from a retirement plan and the use of an annuity backed by junk bonds to increase to monetary amount of the surplus seized. Riley v. Murdock, 828 F. Supp. 1215 (E.D.N.C. 1993).

Filing of Claim in Court Not Required. — Section 28A-19-1 sets out the manner of presentation of claims including some circumstances under which the filing of an action in a court of law may constitute the presentation of a claim; however, this section does not require the filing of an action in a court of law. Ragan v. Hill, 337 N.C. 667, 447 S.E.2d 371 (1994).

Language of subsection (i) provides an exception to limitations only for claims where there is insurance under which a decedent was insured. Brace v. Strother, 90 N.C. App. 357, 368 S.E.2d 447, cert. denied, 232 N.C. 171, 373 S.E.2d 104 (1988).

Recovery Limited After Six Months. — Automobile accident victim who filed suit more than six months after the accident was limited in his amount of recovery by the amount of the deceased defendant's automobile insurance. Brace v. Strother, 90 N.C. App. 357, 368 S.E.2d 447, cert. denied, 232 N.C. 171, 373 S.E.2d 104 (1988).

Claim Not Barred Where Personal Representative Was Not Appointed. — Plaintiffs' cause of action is not barred for failure to present the claim to the personal representative within the time prescribed by subsection (b) where no personal representative or collector had been appointed for the estate. Ragan v. Hill, 337 N.C. 667, 447 S.E.2d 371 (1994).

Under Subsection (i) Plaintiff Barred from Claim Greater Than Underinsurance Coverage. — Where, pursuant to subsection (i) of this section, all that plaintiff could recover from the underinsured decedent was the $25,000.00 coverage the decedent had under his policy with insurer, plaintiff, who was only legally entitled, by statute, to recover this amount, and nothing more, from decedent could not bring a claim for a greater amount against insurer under his underinsured motorist endorsement. Brace v. Strother, 90 N.C. App. 357, 368 S.E.2d 447, cert. denied, 232 N.C. 171, 373 S.E.2d 104 (1988).

Claim for Compensation for Occupation of Property Not Barred Where Presented Within Period Under Section. — A landowner's claim for "reasonable compensation" for occupation of her property (§ 42-4), brought against one of the former co-tenants as administratrix of her husband's estate, was presented to the administratrix within the statutory period under this section and was therefor not barred by the three-year statute of limitations (§ 1-52(2)) as of the decedent's death. The landowner was allowed to sue the administratrix for rents not paid in the period of three years prior to the decedent's death, although the action itself was not brought until some six months after this date. Simon v. Mock, 75 N.C. App. 564, 331 S.E.2d 300 (1985).

Reopening of Estate After Six-Month Period. — The provision in § 28A-23-5 prohibiting any claim which is already barred from being asserted in the reopened estate primarily refers to the limitations in this section on the presentation of claims. Thus, an estate may not ordinarily be reopened for the litigation of claims not brought within the six-month period, even in the absence of a bar by some other statute of limitations. In re Estate of English, 83 N.C. App. 359, 350 S.E.2d 379 (1986), cert. denied, 319 N.C. 403, 354 S.E.2d 711 (1987).

Refusal of Clerk to Reopen Upheld. — In light of the public policy in favor of the expedited administration of estates, as evidenced by the six-month statute of limitations and other provisions of this Chapter, petitioner who alleged that the deceased had promised to devise a life estate to her had a heavy burden of justifying her failure to bring her suit within the six-month period provided for that purpose, or at the very least, within the greater than two-year period that the estate actually remained open. There was no error in the clerk's determination that this burden was not met. In re Estate of English, 83 N.C. App. 359, 350 S.E.2d 379 (1986), cert. denied, 319 N.C. 403, 354 S.E.2d 711 (1987).

Applied in Thorpe v. DeMent, 69 N.C. App. 355, 317 S.E.2d 692 (1984); Leggett v. Rose, 776 F. Supp. 229 (E.D.N.C. 1991); State Farm Mut. Auto. Ins. Co. v. Blackwelder, 332 N.C. 135, 418 S.E.2d 229 (1992).

Quoted in Lassiter v. Faison, 111 N.C. App. 206, 432 S.E.2d 373 (1993).

§ 28A-19-5. Contingent claims.

CASE NOTES

Applied in In re Watson, 70 N.C. App. 120, 318 S.E.2d 544 (1984).

§ 28A-19-6. Order of payment of claims.

After payment of costs and expenses of administration, the claims against the estate of a decedent must be paid in the following order:

First class. Claims which by law have a specific lien on property to an amount not exceeding the value of such property.

Second class. Funeral expenses to the extent of two thousand five hundred dollars ($2,500). This limitation shall not include cemetery lot or gravestone. The preferential limitation herein granted shall be construed to be only a limit with respect to preference of payment and shall not be construed to be a limitation on reasonable funeral expenses which may be incurred; nor shall the preferential limitation of payment in the amount of two thousand five hundred dollars ($2,500) be diminished by any Veterans Administration, social security or other federal governmental benefits awarded to the estate of the decedent or to his or her beneficiaries.

Third class. All dues, taxes, and other claims with preference under the laws of the United States.

Fourth class. All dues, taxes, and other claims with preference under the laws of the State of North Carolina and its subdivisions.

Fifth class. Judgments of any court of competent jurisdiction within the State, docketed and in force, to the extent to which they are a lien on the property of the decedent at his death.

Sixth class. Wages due to any employee employed by the decedent, which claim for wages shall not extend to a period of more than 12 months next preceding the death; or if such employee was employed for the year current at the decease, then from the time of such employment; for medical services within the 12 months preceding the decease; for drugs and all other medical supplies necessary for the treatment of such decedent during the last illness of such decedent, said period of last illness not to exceed 12 months.

Seventh class. All other claims. (1868-9, c. 113, s. 24; Code, s. 1416; Rev., s. 87; C.S., s. 93; 1941, c. 271; 1955, c. 641, s. 1; 1967, c. 1066; 1973, c. 1329, s. 3; 1981, c. 383, ss. 1, 2; 1987, c. 286; 1995, c. 262, s. 8.)

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, and applicable to estates of persons dying on or after that date, twice substituted "two thousand five hundred dollars ($2,500)" for "two thousand dollars ($2,000)" in the third paragraph.

§ 28A-19-8. Funeral expenses of decedent.

CASE NOTES

Section Does Not Limit Collection of Expenses Exclusively to an Estate. — This section does not limit collection of funeral expenses exclusively to the estate. Parrish Funeral Home v. Pittman, 104 N.C. App. 268, 409 S.E.2d 327 (1991).

Other Person's Promise to Pay Fu-

neral Expenses. — Defendant's alleged promise to pay funeral expenses for his deceased father if the estate did not was a promise to pay the debt of another, which is void by law unless in writing. Parrish Funeral Home v. Pittman, 104 N.C. App. 268, 409 S.E.2d 327 (1991), holding, however, that as defendants did not specifically plead the statute of frauds, it was not available as a defense.

§ 28A-19-12. Claims due representative not preferred.

CASE NOTES

Attorneys' Fees and Commissions. — This section does not apply to the payment of attorneys' fees and commissions. In re Estate of Longest, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied and appeal dismissed, 314 N.C. 330, 333 S.E.2d 488 (1985).

Claims by Personal Representative. — This section applies to "claims" against the estate, such as liens against property, funeral expenses, taxes, and judgments, where the claimant also happens to be the personal representative of the estate. In re Estate of Longest, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied and appeal dismissed, 314 N.C. 330, 333 S.E.2d 488 (1985).

§ 28A-19-15. Disputed claim may be referred.

CASE NOTES

Agreement to Refer Lacking. — Where the executor's letter to claimant merely stated that he "would suggest" that claimant "file a notice of hearing with the Clerk of Court" the language did not show that there was any agreement to refer the matter. In re Estate of Neisen, 114 N.C. App. 82, 440 S.E.2d 855 (1994), cert. denied, 336 N.C. 606, 447 S.E.2d 397 (1994).

§ 28A-19-16. Disputed claim not referred barred in three months.

CASE NOTES

This statute provides the only procedure for the resolution of a rejected claim. In re Estate of Neisen, 114 N.C. App. 82, 440 S.E.2d 855 (1994), cert. denied, 336 N.C. 606, 447 S.E.2d 397 (1994).

This section applies to creditors' claims against an estate and not to the interests of heirs. The cases construing this Article involve actions by creditors to recover debts. Moreover, § 28A-19-3(h) expressly provides that the word "claim" as used in this Article "does not apply to claims of heirs or devisees to their respective shares or interests in the decedent's estate in their capacity as such heirs or devisees." Poteat v. Robinson, 90 N.C. App. 764, 370 S.E.2d 61 (1988).

Three Calendar Months Not Equal to 90 Days. — Plaintiff had three calendar months, not 90 days, in which to file an action, thus the trial court erred in dismissing plaintiff's cause of action based on the statute of limitations. Storey v. Hailey, 114 N.C. App. 173, 441 S.E.2d 602 (1994).

Cited in Blalock v. Dandelake, 90 N.C. App. 461, 368 S.E.2d 891 (1988).

ARTICLE 21.

Accounting.

§ 28A-21-1. Annual accounts.

Until the final account has been filed pursuant to G.S. 28A-21-2, the personal representative or collector shall, for so long as any of the property of the estate remains in his control, custody or possession, file annually in the office of the clerk of superior court an inventory and account, under oath, of the amount of property received by him, or invested by him, and the manner and nature of such investment, and his receipts and disbursements for the past year. Such accounts shall be due by the fifteenth day of the fourth month after the close of the fiscal year selected by the personal representative or collector, and annually thereafter. The election of a fiscal year shall be made by the personal representative or collector upon filing of the first annual account. In no event may a personal representative or collector select a fiscal year-end which is more than twelve months from the date of death of a decedent or, in the case of trust administration, the date of the opening of the trust. Any fiscal year selected may not be changed without the permission of the clerk of superior court.

The personal representative or collector shall produce vouchers for all payments or verified proof for all payments in lieu of vouchers. The clerk of superior court may examine, under oath, such accounting party, or any other person, concerning the receipts, disbursements or any other matter relating to the estate. He must carefully review and audit such account and, if he approves the account, he must endorse his approval thereon, which shall be prima facie evidence of correctness, and cause the same to be recorded. (C.C.P., s. 478; 1871-2, c. 46; Code, s. 1399; Rev., s. 99; C.S., s. 105; 1957, c. 783, s. 5; 1973, c. 1329, s. 3; 1977, c. 446, s. 1; 1981, c. 955, s. 1; 1987, c. 783, s. 1; 1991, c. 485, s. 1.)

§ 28A-21-2. Final accounts.

(a) Unless the time for filing the final account has been extended by the clerk of superior court, the personal representative or collector must file his final account for settlement within one year of his qualification or within six months after his receipt of the State inheritance tax release, whichever is later. If no inheritance tax return was required to be filed for the estate under G.S. 105-23 because the estate met the requirements of subsection (b) of that section, the personal representative or collector shall so certify in the final account filed with the clerk of superior court. Such certification shall list the amount and value of all of the decedent's property, and with respect to real estate, its particular location within or outside the State, including any property transferred by the decedent over which he had retained any interest as described in G.S. 105-2(a)(3), or any property transferred within three years prior to the date of the decedent's death, and after being filed and accepted by the clerk of the superior court shall be prima facie evidence that such property is free of any State inheritance or State estate tax liability. The personal representative or collector shall produce vouchers for all payments or verified proof for all payments in lieu of vouchers. With the approval of the clerk of superior court, such account may be filed voluntarily at any time. In all cases, the accounting shall be reviewed, audited and recorded by the clerk of superior court in the manner prescribed in G.S. 28A-21-1.

(b) Except as provided in subsection (a), after the date specified in the general notice to creditors as provided for in G.S. 28A-14-1, if all of the debts and other claims against the estate of the decedent duly presented and legally owing have been paid in the case of a solvent estate or satisfied pro rata according to applicable statutes in the case of an insolvent estate, the personal representative or collector may file his final account to be reviewed, audited and recorded by the clerk of superior court. Nothing in this subsection shall be construed as limiting the right of the surviving spouse or minor children to file for allowances under G.S. 30-15 through 30-18 and the right of a surviving spouse to file for property rights under G.S. 29-30. (C.C.P., s. 481; Code, s. 1402; Rev., s. 103; C.S., s. 109; 1973, c. 1329, s. 3; 1975, c. 637, s. 5; 1977, c. 446, s. 1; 1979, c. 801, s. 13; 1981, c. 955, s. 2; 1981 (Reg. Sess., 1982), c. 1221, s. 3; 1985, c. 82, s. 3; c. 656, s. 3.1; 1985 (Reg. Sess., 1986), c. 822, s. 3; 1989, c. 770, s. 9.)

Editor's Note. —

Session Laws 1985, c. 656, which amended this section, provided in s. 55: "This act shall be known as the 'Tax Reduction Act of 1985'."

Section 56 of Session Laws 1985, c. 656 provided that the act would not affect the rights or liabilities of the State or a taxpayer arising under a section amended or repealed by the act before its amendment or repeal, nor affect the right to any refund or credit of a tax, such as the franchise tax credit under § 105-120.2(d) (now repealed) or § 105-122(d) that would otherwise have been available under a section amended or repealed by the act before its amendment or repeal.

§ 28A-21-4. Clerk may compel account.

CASE NOTES

Cited in In re Estate of Longest, 74 N.C. App. 386, 328 S.E.2d 804 (1985); Matthews v. Watkins, 91 N.C. App. 640, 373 S.E.2d 133 (1988).

ARTICLE 22.

Distribution.

§ 28A-22-1. Scheme of distribution; testate and intestate estates.

CASE NOTES

Cited in Lee v. Barksdale, 83 N.C. App. 368, 350 S.E.2d 508 (1986).

§ 28A-22-5. Distribution of assets in kind in satisfaction of bequests and transfers in trust.

(a) Subject to the provisions of subsection (b) of this section, whenever under any will or trust indenture the executor, trustee or other fiduciary is required to, or has an option to, satisfy a bequest or transfer in trust by a transfer of assets of the estate or trust in kind at the values as finally determined for federal estate tax purposes, the executor, trustee or other fiduciary shall, in the absence of contrary provisions in such will or trust indenture, be required to satisfy such bequest or transfer by the distribution of assets fairly representative of the appreciation or depreciation in the value of all property available for distribution in satisfaction of such bequest or transfer.

(b) The provisions of subsection (a) of this section shall not apply unless either:

(1) The decedent's surviving spouse is the beneficiary of the bequest or trust transfer described in subsection (a) of this section or of the residue of the estate or trust; or

(2) Any "skip person", as that term is defined in Chapter 13 of the Internal Revenue Code of 1986, as amended, is or may be a current or future beneficiary of the bequest or trust transfer described in subsection (a) of this section or of the residue of the estate or trust, and the value of the decedent's gross estate for federal tax purposes exceeds the value of the decedent's unused generation-skipping tax exemption available under Chapter 13 of the Internal Revenue Code of 1986, as amended. (1965, c. 764, s. 1; 1973, c. 1329, s. 3; 1995, c. 235, s. 5.)

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, and applicable to all distributions made on or after that date, deleted "for surviving spouse" from the end of the catchline; added the subsection (a) designation; in subsection (a), added "Subject to the provisions of subsection (b) of this section" to the beginning and deleted "to or for the benefit of the surviving spouse of a decedent" preceding "by a transfer of assets"; and added subsection (b).

ARTICLE 23.

Settlement.

§ 28A-23-1. Settlement after final account filed.

CASE NOTES

Applied in In re Watson, 70 N.C. App. 120, 318 S.E.2d 544 (1984).

§ 28A-23-2. Payment into court of fund due minor.

When any personal representative or collector holds property due a minor without a guardian and desires to file his petition for settlement, he may deliver the property to the clerk of superior court who shall invest upon interest or otherwise manage said property for the use of the minor or the clerk may proceed to appoint a guardian for the minor pursuant to the provisions of Chapter 35A of the General Statutes and then may deliver the property of the minor to the guardian. (1868-9, c. 113, s. 97; Code, s. 1526; 1893, c. 317; Rev., s. 151; C.S., s. 153; 1965, c. 815, s. 3; 1973, c. 1329, s. 3; 1987, c. 550, s. 17.)

§ 28A-23-3. Commissions allowed personal representatives; representatives guilty of misconduct or default.

Editor's Note. — The reference in the historical citation to Session Laws 1959, c. 622 should be to Session Laws 1959, c. 662.

CASE NOTES

Purpose of Subsection (b). — Subsection (b) of this section ensures that the personal representative's commission on a sale of real estate is limited to the amount that was actually needed for the payment of claims. This discourages personal representatives from selling land merely to increase their commissions. Matthews v. Watkins, 91 N.C. App. 640, 373 S.E.2d 133 (1988), aff'd, 324 N.C. 541, 379 S.E.2d 857 (1989).

Discretion of Clerk. —
The allowance of a commission to an executor is a matter within the original jurisdiction of the clerk of the superior court and it is within his discretion to fix the amount, subject to the maximum provided by statute. In re Estate of Longest, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied and appeal dismissed, 314 N.C. 330, 333 S.E.2d 488 (1985).

An executor has no right to fix and determine compensation to be received by him. In re Estate of Longest, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied and appeal dismissed, 314 N.C. 330, 333 S.E.2d 488 (1985).

It is necessary for the executor to file a petition for commissions and fees along with the annual accountings to enable the clerk to determine the amount of the commission and attorneys' fees. In re Estate of Longest, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied and appeal dismissed, 314 N.C. 330, 333 S.E.2d 488 (1985).

Payment of Commissions Held Proper. — Commissions to the executor of an estate could be paid on proceeds from the sale of real estate where the executor was required to sell the property under the terms of the will and the property was not sold to pay debts or legacies. Matthews v. Watkins, 91 N.C. App. 640, 373 S.E.2d 133 (1988), aff'd, 324 N.C. 541, 379 S.E.2d 857 (1989).

Advance Held Improper. — Because the clerk alone has the discretion to fix an executor's compensation and an attorneys' fee, coexecutor's advance to himself of the sum of $32,950.00 from the estate was improper. In re Estate of Longest, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied and appeal dismissed, 314 N.C. 330, 333 S.E.2d 488 (1985).

§ 28A-23-4. Counsel fees allowable to attorneys serving as representatives.

CASE NOTES

Fees awarded under this section should be for actual services rendered and should not be based solely upon the size of the estate; nevertheless, the size of the estate provides a useful guideline and may be considered as a factor in determining whether legal services were necessary and the time expended justified. Matthews v. Watkins, 91 N.C. App. 640, 373 S.E.2d 133 (1988), aff'd, 324 N.C. 541, 379 S.E.2d 857 (1989).

Advance Held Improper. — Because the clerk alone has the discretion to fix an executor's compensation and an attorneys' fee, coexecutor's advance to himself of the sum of $32,950.00 from the estate was improper. In re Estate of Longest, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied and appeal dismissed, 314 N.C. 330, 333 S.E.2d 488 (1985).

Cited in In re Lessard, 78 N.C. App. 196, 336 S.E.2d 712 (1985).

§ 28A-23-5. Reopening administration.

CASE NOTES

"Proper Cause" to Reopen. — The existence of a valid claim against an estate which is not time-barred may, in an appropriate case, constitute "proper cause" to reopen a closed estate in order to assert the claim. However, claims which are already barred may not be asserted in a reopened administration. Thus, without more, a claim which is barred by the statute of limitations may not constitute "proper cause" to reopen administration of a closed estate. In re Estate of English, 83 N.C. App. 359, 350 S.E.2d 379 (1986), cert. denied, 319 N.C. 403, 354 S.E.2d 711 (1987).

Reopening of Estate After Six-Month Period. — The provision in this section prohibiting any claim which is already barred from being asserted in the reopened estate primarily refers to the limitations in § 28A-19-3 on the presentation of claims. Thus, an estate may not ordinarily be reopened for the litigation of claims not brought within the six-month period, even in the absence of a bar by some other statute of limitations. In re Estate of English, 83 N.C. App. 359, 350 S.E.2d 379 (1986), cert. denied, 319 N.C. 403, 354 S.E.2d 711 (1987).

Refusal of Clerk to Reopen Estate Upheld. — In light of the public policy in favor of the expedited administration of estates, as evidenced by the six-month statute of limitations and other provisions of this Chapter, petitioner who alleged that the deceased had promised to devise a life estate to her had a heavy burden of justifying her failure to bring her suit within the six-month period provided for that purpose, or at the very least, within the greater than two-year period that the estate actually remained open. There was no error in the clerk's determination that this burden was not met. In re Estate of English, 83 N.C. App. 359, 350 S.E.2d 379 (1986), cert. denied, 319 N.C. 403, 354 S.E.2d 711 (1987).

ARTICLE 25.

Small Estates.

§ 28A-25-1. Collection of property by affidavit when decedent dies intestate.

(a) When a decedent dies intestate leaving personal property, less liens and encumbrances thereon, not exceeding ten thousand dollars ($10,000) in value, at any time after 30 days from the date of death, any person indebted to the decedent or having possession of tangible personal property or an instrument evidencing a debt, obligation, stock or chose in action belonging to the decedent shall make payment of the indebtedness or deliver the tangible personal property or an instrument evidencing a debt, obligation, stock or chose in action to a person claiming to be the public administrator appointed pursuant to G.S. 28A-12- 1, or an heir or creditor of the decedent, not disqualified under G.S. 28A-4-2, upon being presented a certified copy of an affidavit filed in accordance with subsection (b) and made by or on behalf of the heir or creditor or the public administrator stating:

(1) The name and address of the affiant and the fact that he or she is the public administrator or an heir or creditor of the decedent;

(2) The name of the decedent and his residence at time of death;
(3) The date and place of death of the decedent;
(4) That 30 days have elapsed since the death of the decedent;
(5) That the value of all the personal property owned by the estate of the decedent, less liens and encumbrances thereon, does not exceed ten thousand dollars ($10,000);
(6) That no application or petition for appointment of a personal representative is pending or has been granted in any jurisdiction;
(7) The names and addresses of those persons who are entitled, under the provisions of the Intestate Succession Act, to the personal property of the decedent and their relationship, if any, to the decedent; and
(8) A description sufficient to identify each tract of real property owned by the decedent at the time of his death.

In those cases in which the affiant is the surviving spouse and sole heir of the decedent, not disqualified under G.S. 28A-4-2, the property described in this subsection that may be collected pursuant to this section may exceed ten thousand dollars ($10,000) in value but shall not exceed twenty thousand dollars ($20,000) in value. In such cases, the affidavit shall state: (i) the name and address of the affiant and the fact that he or she is the surviving spouse and is entitled, under the provisions of the Intestate Succession Act, to all of the property of the decedent; (ii) that the value of all of the personal property owned by the estate of the decedent, less liens and encumbrances thereon, does not exceed twenty thousand dollars ($20,000); and (iii) the information required under subdivisions (2), (3), (4), (6), and (8) of this subsection.

(b) Prior to the recovery of any assets of the decedent, a copy of the affidavit described in subsection (a) shall be filed in the office of the clerk of superior court of the county where the decedent had his domicile at the time of his death. The affidavit shall be filed by the clerk upon payment of the fee provided in G.S. 7A-307, shall be indexed in the index to estates, and a copy thereof shall be mailed by the clerk to the persons shown in the affidavit as entitled to the personal property.

(c) The presentation of an affidavit as provided in subsection (a) shall be sufficient to require the transfer to the affiant or his designee of the title and license to a motor vehicle registered in the name of the decedent owner; the ownership rights of a savings account or checking account in a bank in the name of the decedent owner; the ownership rights of a savings account or share certificate in a credit union, building and loan association, or savings and loan association in the name of the decedent owner; the ownership rights in any stock or security registered on the books of a corporation in the name of a decedent owner; or any other property or contract right owned by decedent at the time of his death. (1973, c. 1329, s. 3; 1975, c. 300, s. 9; 1983, c. 65, s. 1; c. 713, s. 21; 1985, c. 651, s. 1; 1989, c. 407, s. 1; 1995, c. 262, s. 1.)

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, and applicable to estates of persons dying on or after that date, added the last paragraph in subsection (a).

CASE NOTES

Action Properly Dismissed Against Defendants Who Were Merely Collectors by Affidavit. — Where plaintiff was required by this statute to bring his action against the collector or personal representative, his action was properly dismissed when he filed his action against defendants who were merely collectors by affidavit under this section, since plaintiff failed to bring his action against the proper party or parties. Brace v. Strother, 90 N.C. App. 357, 368 S.E.2d 447, cert. denied, 323 N.C. 171, 373 S.E.2d 104 (1988).

Cited in Little v. Bennington, 109 N.C. App. 482, 427 S.E.2d 887 (1993).

§ 28A-25-1.1. Collection of property by affidavit when decedent dies testate.

(a) When a decedent dies testate leaving personal property, less liens and encumbrances thereon, not exceeding ten thousand dollars ($10,000) in value, at any time after 30 days from the date of death, any person indebted to the decedent or having possession of tangible personal property or an instrument evidencing a debt, obligation, stock or chose in action belonging to the decedent shall make payment of the indebtedness or deliver the tangible personal property or an instrument evidencing a debt, obligation, stock or chose in action to a person claiming to be the public administrator appointed pursuant to G.S. 28A-12-1, a person named or designated as executor in the will, devisee, heir or creditor, of the decedent, not disqualified under G.S. 28A-4-2, upon being presented a certified copy of an affidavit filed in accordance with subsection (b) and made by or on behalf of the heir, the person named or designated as executor in the will of the decedent, the creditor, the public administrator, or the devisee, stating:

(1) The name and address of the affiant and the fact that he is the public administrator, a person named or designated as executor in the will, devisee, heir or creditor, of the decedent;

(2) The name of the decedent and his residence at time of death;

(3) The date and place of death of the decedent;

(4) That 30 days have elapsed since the death of the decedent;

(5) That the decedent died testate leaving personal property, less liens and encumbrances thereon, not exceeding ten thousand dollars ($10,000) in value;

(6) That the decedent's will has been admitted to probate in the court of the proper county and a duly certified copy of the will has been recorded in each county in which is located any real property owned by the decedent at the time of his death;

(7) That a certified copy of the decedent's will is attached to the affidavit;

(8) That no application or petition for appointment of a personal representative is pending or has been granted in any jurisdiction;

(9) The names and addresses of those persons who are entitled, under the provisions of the will, or if applicable, of the Intestate Succession Act, to the property of the decedent; and their relationship, if any, to the decedent; and

(10) A description sufficient to identify each tract of real property owned by the decedent at the time of his death.

In those cases in which the affiant is the surviving spouse, is entitled to all of the property of the decedent, and is not disqualified under G.S. 28A-4-2, the property described in this subsection that may be collected pursuant to this section may exceed ten thousand dollars ($10,000) in value but shall not exceed twenty thousand dollars ($20,000) in value. In such cases, the affidavit shall state: (i) the name and address of the affiant and the fact that he or she is the surviving spouse and is entitled, under the provisions of the decedent's will, or if applicable, of the Intestate Succession Act, to all of the property of the decedent; (ii) that the decedent died testate leaving personal property, less liens and encumbrances thereon, not exceeding twenty thousand dollars ($20,000); and (iii) the information required under subdivisions (2), (3), (4), (6), (7), (8), and (10) of this subsection.

(b) Prior to the recovery of any assets of the decedent, a copy of the affidavit described in subsection (a) shall be filed in the office of the clerk of superior court of the county where the decedent had his domicile at the time of his death. The affidavit shall be filed by the clerk upon payment of the fee provided in G.S. 7A-307, shall be indexed in the index to estates, and a copy shall be mailed by the clerk to the persons shown in the affidavit as entitled to the property.

(c) The presentation of an affidavit as provided in subsection (a) shall be sufficient to require the transfer to the affiant or his designee of the title and license to a motor vehicle registered in the name of the decedent owner; the ownership rights of a savings account or checking account in a bank in the name of the decedent owner; the ownership rights of a savings account or share certificate in a credit union, building and loan association, or savings and loan association in the name of the decedent owner; the ownership rights in any stock or security registered on the books of a corporation in the name of a decedent owner; or any other property or contract right owned by decedent at the time of his death. (1985, c. 651, s. 2; 1987, c. 670, s. 1; 1989, c. 407, s. 2; 1995, c. 262, s. 2.)

Editor's Note. — Session Laws 1985, c. 651, s. 7 made this section effective October 1, 1985.

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, and applicable to estates of persons dying on or after that date, added the last paragraph in subsection (a).

§ 28A-25-2. Effect of affidavit.

The person paying, delivering, transferring or issuing personal property or the evidence thereof pursuant to an affidavit meeting the requirements of G.S. 28A-25-1(a) or G.S. 28A-25-1.1(a) is discharged and released to the same extent as if he dealt with a duly qualified personal representative of the decedent. He is not required to see to the application of the personal property or evidence thereof or to inquire into the truth of any statement in the affidavit. If any person to whom an affidavit is delivered refuses to pay, deliver, transfer, or issue any personal property or evidence thereof, it may be recovered or its payment, delivery, transfer, or issuance compelled upon proof of their right in an action brought for that purpose by or on behalf of the persons entitled thereto. The court costs and attorney's fee incident to the action shall be taxed against the person whose refusal to comply with the provisions of G.S. 28A-25-1(a) or G.S. 28A-25-1.1(a) made the action necessary. The heir or creditor to whom payment, delivery, transfer or issuance is made is answerable and accountable therefore to any duly qualified personal representative or collector of the decedent's estate or to any other person having an interest in the estate. (1973, c. 1329, s. 3; 1985, c. 651, s. 3; 1987, c. 670, s. 2.)

§ 28A-25-3. Disbursement and distribution of property collected by affidavit.

(a) If there has been no personal representative or collector appointed by the clerk of superior court, the affiant who has collected personal property of the decedent by affidavit pursuant to G.S. 28A-25-1 or G.S. 28A-25-1.1 shall:

(1) Disburse and distribute the same in the following order:

  a. To the payment of the surviving spouse's year's allowance and the children's year's allowance assigned in accordance with G.S. 30-15 through G.S. 30-33;

  b. To the payment of the debts and claims against the estate of the decedent in the order of priority set forth in G.S. 28A-19-6, or to the reimbursement of any person who has already made payment thereof;

  c. To the distribution of the remainder of the personal property to the persons entitled thereto under the provisions of the will or of the Intestate Succession Act; and

(2) File an affidavit with the clerk of superior court that he has collected the personal property of the decedent and the manner in which he has disbursed and distributed the same. This final affidavit shall be filed within 90 days of the date of filing of the qualifying affidavit provided for in G.S. 28A-25-1 or G.S. 28A-25-1.1. If the affiant cannot file the final affidavit within 90 days, he shall file a report with the clerk within that time period stating his reasons. Upon determining that the affiant has good reason not to file the final affidavit within 90 days, the clerk may extend the time for filing up to one year from the date of filing the qualifying affidavit.

(b) Nothing in this section shall be construed as changing the rule of G.S. 28A-15-1 and G.S. 28A-15-5 rendering both real and personal property, without preference or priority, available for the discharge of debts and other claims against the estate of the decedent. If it appears that it may be in the best interest of the estate to sell, lease, or mortgage any real property to obtain money for the payment of debts or other claims against the decedent's estate, the affiant shall petition the clerk of superior court for the appointment of a personal representative to conclude the administration of the decedent's estate pursuant to G.S. 28A-25-5. (1973, c. 1329, s. 3; 1983, c. 711, s. 1; 1985, c. 651, s. 4; 1987, c. 670, s. 3; 1989, c. 407, s. 3.)

CASE NOTES

Action Properly Dismissed Against Defendants Who Were Merely Collectors by Affidavit. — Where plaintiff was required by this statute to bring his action against the collector or personal representative, his action was properly dismissed when he filed his action against defendants who were merely collectors by affidavit under § 28A-25-1, since plaintiff failed to bring his action against the proper party or parties. Brace v. Strother, 90 N.C. App.

357, 368 S.E.2d 447, cert. denied, 323 N.C. 171, 373 S.E.2d 104 (1988).

Cited in Ragan v. Hill, 337 N.C. 667, 447 S.E.2d 371 (1994).

§ 28A-25-4. Clerk may compel compliance.

If any affiant who has collected personal property of the decedent by affidavit pursuant to G.S. 28A-25-1 or G.S. 28A-25-1.1 shall fail to make distribution or file affidavit as required by G.S. 28A-25-3, the clerk of superior court may, upon his own motion or at the request of any interested person, issue an attachment against him for a contempt and commit him until he makes proper distribution and files the affidavit. In addition to or in lieu of filing this attachment, the clerk may require the affiant to post a bond conditioned as provided in G.S. 28A-8-2. (1973, c. 1329, s. 3; 1983, c. 711, s. 2; 1985, c. 651, s. 5; 1987, c. 670, s. 4; 1989, c. 407, s. 4.)

CASE NOTES

Challenging Order Under this Section. — Order of contempt and commitment entered against plaintiff-executor for failure to file account on estate and to appear and show cause was a valid court order pursuant to this section. In contesting this court order, plaintiff's proper course of action would have been to appeal the order itself. Instead, plaintiff attacked the order by seeking declaratory relief and the expunction of his records in a wholly separate action. The trial court had no authority to grant plaintiff the relief sought in that it had no power collaterally to vacate the order of contempt and commitment. Therefore, the trial court's dismissal of plaintiff's claim under Rules 12(b)(1) and (6) was proper. Little v. Bennington, 109 N.C. App. 482, 427 S.E.2d 887 (1993), pet. disc. review denied, 334 N.C. 164, 432 S.E.2d 362 (1993).

§ 28A-25-5. Subsequently appointed personal representative or collector.

Nothing in this Article shall preclude any interested person, including the affiant, from petitioning the clerk of superior court for the appointment of a personal representative or collector to conclude the administration of the decedent's estate. If such is done, the affiant who has been collected personal property by affidavit shall cease to do so, shall deliver all assets in his possession to the personal representative, and shall render a proper accounting to the personal representative or collector. A copy of the accounting shall also be filed with the clerk having jurisdiction over the personal representative or collector. (1973, c. 1329, s. 3; 1975, c. 300, s. 10; 1985, c. 651, s. 6; 1987, c. 670, s. 5.)

§ 28A-25-6. Payment to clerk of money owed decedent.

(a) As an alternative to the small estate settlement procedures of this Article, any person indebted to a decedent may satisfy such indebtedness by paying the amount of the debt to the clerk of the superior court of the county of the domicile of the decedent:

(1) If no administrator has been appointed, and

(2) If the amount owed by such person does not exceed five thousand dollars ($5,000), and

(3) If the sum tendered to the clerk would not make the aggregate sum which has come into the clerk's hands

belonging to the decedent exceed five thousand dollars ($5,000).

(b) Such payments may not be made to the clerk if the total amount paid or tendered with respect to any one decedent would exceed five thousand dollars ($5,000), even though disbursements have been made so that the aggregate amount in the clerk's hands at any one time would not exceed five thousand dollars ($5,000).

(c) If the sum tendered pursuant to this section would make the aggregate sum coming into the clerk's hands with respect to any one decedent exceed five thousand dollars ($5,000) the clerk shall appoint an administrator, or the sum may be administered under the preceding sections of this Article.

(d) If it appears to the clerk after making a preliminary survey that disbursements pursuant to this section would not exhaust funds received pursuant to this section, he may, in his discretion, appoint an administrator, or the funds may be administered under the preceding sections of this Article.

(e) The receipt from the clerk of the superior court of a payment purporting to be made pursuant to this section is a full release to the debtor for the payment so made.

(f) If no administrator has been appointed, the clerk of superior court shall disburse the money received under this section for the following purposes and in the following order:

(1) To pay the surviving spouse's year's allowance and children's year's allowance assigned in accordance with law;
(2) Repealed by Session Laws 1981, c. 383, s. 3.
(3) Repealed by Session Laws 1981, c. 383, s. 3.
(4) All other claims shall be disbursed according to the order set out in G.S. 28A-19-6.

Notwithstanding the foregoing provisions of this subsection, the clerk shall pay, out of funds provided the deceased pursuant to G.S. 111-18 and Part 3 of Article 2 of Chapter 108A of the General Statutes of North Carolina, any lawful claims for care provided by an adult care home to the deceased, incurred not more than 90 days prior to his death. After the death of a spouse who died intestate and after the disbursements have been made in accordance with this subsection, the balance in the clerk's hands belonging to the estate of the decedent shall be paid to the surviving spouse, and if there is no surviving spouse, the clerk shall pay it to the heirs in proportion to their respective interests.

(g) The clerk shall not be required to publish notice to creditors.

(h) Whenever an administrator is appointed after a clerk of superior court has received any money pursuant to this section, the clerk shall pay to the administrator all funds which have not been disbursed. The clerk shall receive no commissions for payments made to the administrator, and the administrator shall receive no commissions for receiving such payments. (1921, c. 93; Ex. Sess. 1921, c. 65; C.S., s. 65(a); Ex. Sess. 1924, cc. 15, 58; 1927, c. 7; 1929, cc. 63, 71, 121; 1931, c. 21; 1933, cc. 16, 94; 1935, cc. 69, 96, 367; 1937, cc. 13, 31, 55, 121, 336, 377; 1939, cc. 383, 384; 1941, c. 176; 1943, cc. 24, 114, 138, 560; 1945, cc. 152, 178, 555; 1947, cc. 203, 237; 1949, cc. 17, 81, 691, 762; 1951, c. 380, s. 1; 1955, c. 1246, ss. 103; 1957, c. 491; 1959, c. 795, ss. 1-4; 1965, c. 576, s. 1; 1973, c. 23; c. 1329, s. 1; 1975, c. 344; 1979, c. 163; c. 762, s. 1; 1981, c. 383, s. 3; 1983, c. 65, s. 2; 1987, c. 282, s. 6; 1989 (Reg. Sess., 1990), c. 1015, s. 1; 1995, c. 535, s. 2.)

Editor's Note. — Session Laws 1995, c. 535, which amended this section, in s. 37 provides: "Rules adopted by the Department of Human Resources, the Medical Care Commission, and the Social Services Commission regulating domiciliary care homes prior to the effective date of this act remain in effect for adult care homes until amended or repealed."

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, substituted "care provided by an adult care home to" for "domiciliary care received by" in the first sentence of subsection (f) following subdivision (f)(4).

ARTICLE 27.

Apportionment of Federal Estate Tax.

§ 28A-27-1. Definitions.

For the purposes of this Article:

(1) "Estate" means the gross estate of a decedent as determined for the purpose of the federal estate tax.

(2) "Fiduciary" includes a personal representative and a trustee.

(3) "Person" means any individual, partnership, association, joint stock company, corporation, governmental agency, including any multiples or combinations of the foregoing as, for example, individuals as joint tenants.

(4) "Person interested in the estate" means any person, including a personal representative, guardian, or trustee, entitled to receive, or who has received, from a decedent while alive or by reason of the death of a decedent any property or interest therein included in the decedent's taxable estate.

(5) "State" means any state, territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico.

(6) "Tax" means the net Federal Estate Tax due, after application of any available unified transfer tax credit, and interest and penalties imposed in addition to the tax. (1985 (Reg. Sess., 1986), c. 878, s. 1.)

Editor's Note. — Session Laws 1985 (Reg. Sess. 1986), c. 878, s. 3 made this Article effective October 1, 1986. As to the applicability of the provisions of this Article, see § 28A-27-9.

§ 28A-27-2. Apportionment.

(a) Except as otherwise provided in subsection (b) of this section, or in G.S. 28A-27-5, G.S. 28A-27-6, or G.S. 28A-27-8, the tax shall be apportioned among all persons interested in the estate in the proportion that the value of the interest of each person interested in the estate bears to the total value of the interests of all persons interested in the estate. The values as finally determined for federal estate tax purposes shall be used for the purposes of this computation.

(b) In the event the decedent's will provides a method of apportionment of the tax different from the method provided in subsection (a) above, the method described in the will shall control. However, in the case of any will executed on or after October 1, 1986, a general direction in the will that taxes shall not be apportioned, whether or not referring to this Article, but shall be paid from the residuary portion of the estate shall not, unless specifically stated otherwise, apply to taxes imposed on assets which are includible in the valuation of the decedent's gross estate for federal estate tax purposes only by reason of Sections 2041, 2042 or 2044 of the Internal Revenue Code of 1954 or corresponding provisions of any subsequent tax law. In the case of an estate administered under any will executed on or after October 1, 1986, in the event that the estate tax computation involves assets described in the preceding sentence, unless specifically stated otherwise, apportionment shall be made against such assets and the tax so apportioned shall be recovered from the persons receiving such assets as provided in Sections 2206, 2207 or 2207A of the Internal Revenue Code of 1954 or corresponding provisions of any subsequent tax. (1985 (Reg. Sess., 1986), c. 878, s. 1; 1987, c. 694, s. 1.)

§ 28A-27-3. Procedure for determining apportionment.

(a) The personal representative of a decedent shall determine the apportionment of the tax.

(b) If the personal representative finds that it is inequitable to apportion interest and penalties in the manner provided in this Article because such interest or penalties were imposed due to the fault of one or more persons interested in the estate he may direct apportionment thereon in the manner he finds equitable.

(c) The expenses reasonably incurred by the personal representative in connection with the apportionment of the tax shall be apportioned as provided for taxes under this Article. If the personal representative finds that it is inequitable to apportion the expenses because such expenses were incurred because of the fault of one or more persons interested in the estate he may direct other more equitable apportionment. (1985 (Reg. Sess., 1986), c. 878, s. 1.)

§ 28A-27-4. Uncollected tax.

The personal representative shall not be under any duty to institute any suit or proceeding to recover from any person interested in the estate the amount of the tax apportioned to the person until the expiration of the six months next following final determination of the tax. A personal representative who institutes the suit or proceeding within a reasonable time after the six months' period shall not be subject to any liability or surcharge because any portion of the tax apportioned to any person interested in the estate was collectable at a time following the death of the decedent but thereafter became uncollectable. If the personal representative cannot collect from any person interested in the estate the amount of the tax apportioned to the person, the amount not recoverable shall be apportioned among the other persons interested in the estate who are subject to apportionment. The apportionment shall be made in the proportion that the value of the interest of each remaining person interested in the estate bears to the total value of the interests of all remaining persons interested in the estate. (1985 (Reg. Sess., 1986), c. 878, s. 1.)

§ 28A-27-5. Exemptions, deductions, and credits.

(a) Any interest for which a deduction or exemption is allowed under the federal revenue laws in determining the value of the decedent's net taxable estate, such as property passing to or in trust for a surviving spouse and gifts or bequests for charitable, public, or similar purposes, shall not be included in the computation provided for in G.S. 28A-27-2 to the extent of the allowable deduction or exemption. When such an interest is subject to a prior present interest which is not allowable as a deduction or exemption, such present interest shall not be included in the computation provided for in this Article and no tax shall be apportioned to or paid from principal.

(b) Any credit for property previously taxed and any credit for gift taxes or death taxes of a foreign country paid by the decedent or his estate shall inure to the proportionate benefit of all persons liable to apportionment; provided, however, that if the tax which gives rise to such a credit has in fact been paid by a person interested in the estate, the benefit of such credit shall inure to that person paying the tax.

(c) Any credit for inheritance, succession, or estate taxes or taxes in the nature thereof in respect to property or interests includible in the estate shall inure to the benefit of the persons or interests chargeable with the payment thereof to the extent that, or in the proportion that, the credit reduces the tax.

(d) To the extent that property passing to or in trust for a surviving spouse or any charitable, public, or similar gift or bequest does not constitute an allowed deduction for purposes of the tax solely by reason of an inheritance tax or other death tax imposed upon and deductible from the property, the property shall not be included in the computation provided for in this Article, and to that extent no apportionment shall be made against the property. This section does not apply in any instance where the result will be to deprive the estate of a deduction otherwise allowable under Section 2053(d) of the Internal Revenue Code of 1954 of the United States or corresponding provisions of any subsequent tax law, relating to deduction for State death taxes on transfers for public charitable or religious uses. (1985 (Reg. Sess., 1986), c. 878, s. 1; 1987, c. 694, ss. 2, 3.)

§ 28A-27-6. No apportionment between temporary and remainder interests.

No interest in income and no estate for years or for life or other temporary interest in any property or fund is subject to apportionment as between the temporary interest and the remainder. The tax on the temporary interest and the tax, if any, on the remainder is chargeable against the corpus of the property or funds subject to the temporary interest and remainder. (1985 (Reg. Sess., 1986), c. 878, s. 1.)

§ 28A-27-7. Fiduciary's rights and duties.

(a) The personal representative may withhold from any property of the decedent in his possession, distributable to any person interested in the estate, the amount of the tax apportioned to his interest. If the property in possession of the personal representative and distributable to any person interested in the estate tax is insufficient to satisfy the proportionate amount of the tax determined to be due from the person, the personal representative may recover the deficiency from the person interested in the estate. If the property is not in the possession of the personal representative he may recover from any person interested in the estate the amount of the tax apportioned to the person in accordance with this Article.

(b) If property held by the fiduciary or other person is distributed prior to final apportionment of the tax, the personal representative may require the distributee to provide a bond or other security for the apportionment liability in the form and amount prescribed by the fiduciary, with the approval of the clerk of superior court having jurisdiction of the administration of the estate. (1985 (Reg. Sess., 1986), c. 878, s. 1.)

§ 28A-27-8. Difference with Federal Estate Tax Law.

If the liabilities of persons interested in the estate as prescribed by this Article differ from those which result under the Federal Estate Tax Law, the liabilities imposed by the federal law will control and the balance of this Article shall apply as if the resulting liabilities had been prescribed herein. (1985 (Reg. Sess., 1986), c. 878, s. 1.)

§ 28A-27-9. Effective date.

The provisions of this Article shall not apply to taxes due on account of the death of decedents dying prior to October 1, 1986. (1985 (Reg. Sess., 1986), c. 878, s. 1.)

ARTICLE 28.

Summary Administration.

§ 28A-28-1. Summary administration where spouse is sole beneficiary.

When a decedent dies testate or intestate leaving a surviving spouse as the sole devisee or heir, the surviving spouse may file a petition for summary administration with the clerk of superior court of the county where the decedent was domiciled at the time of death. This procedure is available if the decedent died partially testate, provided that the surviving spouse is the sole devisee under the will and the sole heir of the decedent's intestate property. This procedure is not available if the decedent's will provides that it is not available or if the devise to the surviving spouse is in trust rather than outright. (1995, c. 294, s. 1.)

Editor's Note. — Session Laws 1995, c. 294, s. 2, provides that this Article becomes effective January 1, 1996, and is applicable to the estates of decedents dying on or after that date.

§ 28A-28-2. Petition.

(a) The petition shall be signed by the surviving spouse and verified to be accurate and complete to the best of the spouse's knowledge and belief and shall state as follows:

(1) The name and address of the spouse and the fact that he or she is the surviving spouse of the decedent;

(2) The name and domicile of the decedent at the time of death;

(3) The date and place of death of the decedent;

(4) The date and place of marriage of the spouse and the decedent;

(5) A description sufficient to identify each tract of real property owned in whole or in part by the decedent at the time of death;

(6) A description of the nature of the decedent's personal property and the location of such property, as far as these facts are known or can with reasonable diligence be ascertained;

(7) The probable value of the decedent's personal property, so far as the value is known or can with reasonable diligence be ascertained;

(8) That no application or petition for appointment of a personal representative is pending or has been granted in this State;

(9) That the spouse is the sole devisee or sole heir, or both, of the decedent, and that there is no other devisee or heir; that the decedent's will, if any, does not prohibit summary administration; and that any property passing to the spouse under the will is not in trust;

(10) The name and address of any executor or coexecutor named by the will and that, if the decedent died testate, a copy of the petition has been personally delivered or sent by first-class mail by the spouse to the last-known address of any executor or coexecutor named by the will, if different from the spouse;

(11) That, to the extent of the value of the property received by the spouse under the will of the decedent or by intestate succession, the spouse assumes all liabilities of the decedent that were not discharged by reason of death and assumes liability for all taxes and valid claims against the decedent or the estate, as provided in G.S. 28A-28-6; and

(12) If the decedent died testate, that the decedent's will has been admitted to probate in the court of the proper county; that a duly certified copy of the will has been recorded in each county in which is located any real property owned by the decedent at the time of death; and that a certified copy of the decedent's will is attached to the petition.

(b) The petition shall be filed by the clerk upon payment of the fee provided in G.S. 7A-307 and shall be indexed in the index to estates. (1995, c. 294, s. 1; c. 509, s. 135.2(a).)

Effect of Amendments. — The 1995 amendment by Session Laws 1995, c. 509, s. 135.2(a), effective January 1, 1996, substituted "be" for "by" preceding "ascertained" in subdivision (a)(6).

§ 28A-28-3. Clerk's order.

If it appears to the clerk that the petition and supporting evidence, if any, comply with the requirements of G.S. 28A-28-2 and on the basis thereof the spouse is entitled to summary administration, the clerk shall enter an order to that effect and no further administration of the estate is necessary. Nothing in this section shall preclude a petition under the provisions of G.S. 28A-28-7(a) or the appointment of a personal representative or a collector under the provisions of Article 6 or Article 11 of this Chapter. (1995, c. 294, s. 1.)

§ 28A-28-4. Effect of order.

(a) The presentation of a certified copy of the order described in G.S. 28A-28-3 shall be sufficient to require the transfer to the spouse of any property or contract right owned by the decedent at the time of death, including but not limited to: (i) wages and salary; (ii) the title and license to a motor vehicle registered in the name of the decedent owner; (iii) the ownership rights of a savings account, checking account, or certificate of deposit in a bank in the name of the decedent owner; (iv) the ownership rights of a savings account, share certificate, or certificate of deposit in a credit union, building and loan association, or savings and loan association in the name of the decedent owner; and (v) the ownership rights in any stock or security registered on the books of a corporation in the name of the decedent owner.

(b) After the entry of the order described in G.S. 28A-28-3, the spouse may convey, lease, sell, or mortgage any real property devised to or inherited by the spouse from the decedent, at public or private sale, upon such terms as the spouse may determine. This section shall not limit any other powers the spouse may have over property devised to or inherited by the spouse from the decedent. The provisions of G.S. 28A-17-12 are not applicable to a conveyance, sale, lease, or mortgage under this subsection. (1995, c. 294, s. 1.)

§ 28A-28-5. Effect of payment.

The person paying, delivering, transferring, or issuing property or the evidence thereof pursuant to the order described in G.S. 28A-28-3 is discharged and released to the same extent as if the person dealt with a duly qualified personal representative of the decedent. The person is not required to see to the application of the property or evidence thereof or to inquire into the truth of any statement in the petition or order.

If any person to whom the order is presented refuses to pay, deliver, transfer, or issue any property or evidence thereof, the property may be recovered or its payment, delivery, transfer, or issuance may be compelled in an action brought for that purpose by the surviving spouse. The court costs and attorney's fee incident to the action shall be taxed against the person whose refusal to comply with the provisions of G.S. 28A-28-4 made the action necessary. (1995, c. 294, s. 1.)

§ 28A-28-6. Spouse's assumption of liabilities.

If the clerk grants the order for summary administration, the spouse shall be deemed to have assumed, to the extent of the value of the property received by the spouse under the will of the decedent or by intestate succession, all liabilities of the decedent that were not discharged by reason of death and liability for all taxes and valid claims against the decedent or the estate. The value of the property is the fair market value of the property on the date of death of the decedent less any liens or encumbrances on the property so received. The spouse may assert any defense, counterclaim, cross-claim, or setoff which would have been available to the decedent if the decedent had not died except for actions listed in G.S. 28A-18-1(b). A spouse shall not be deemed to have assumed any liabilities of the decedent that were discharged by reason of death. (1995, c. 294, s. 1.)

§ 28A-28-7. Right to petition for appointment of personal representative; discharge of spouse's liability.

(a) Nothing in this Article shall preclude any person qualified to serve as personal representative pursuant to G.S. 28A-4-1, including the surviving spouse, from petitioning the clerk of superior court for the appointment of a personal representative or collector to administer the decedent's estate. If a personal representative or collector is appointed, the spouse shall render a proper accounting to the personal representative or collector and file a copy of the accounting with the clerk. The spouse shall deliver assets of the decedent's estate, cash, or other property and shall be discharged of liability in accordance with the provisions of subsection (b) of this section.

(b) In the event that a personal representative or collector is appointed, the spouse shall be discharged of liability for the debts of the decedent as follows:

(1) If the spouse delivers to the personal representative or collector all of the property received by the spouse in the identical form that it was received by the spouse, then the spouse will be discharged of all liability.

(2) If the spouse does not deliver to the personal representative or collector all of the property in the identical form that it was received by the spouse, then the spouse shall be discharged of liability as follows:

a. For property delivered to the personal representative or collector that is in the identical form that it was received by the spouse, the spouse is discharged to the extent of the fair market value of the property at the time of the decedent's death or the fair market value at the time the property was received by the personal representative or collector, whichever is greater.

b. For property delivered to the personal representative or collector that is not in the identical form that it was received by the spouse, the spouse is discharged to the extent of the fair market value of such property at the time it was delivered to the personal representative or collector. (1995, c. 294, s. 1.)

Chapter 29.

Intestate Succession.

Article 2.

Shares of Persons Who Take upon Intestacy.

Sec.
29-14. Share of surviving spouse.

ARTICLE 1.

General Provisions.

§ 29-1. Short title.

Legal Periodicals. —
For article, "Requiem for the Rule in Shelley's Case," see 67 N.C.L. Rev. 681 (1989).

CASE NOTES

Cited in In re Estate of Finch, 97 N.C. App. 489, 389 S.E.2d 126 (1990).

§ 29-2. Definitions.

Cross References. — As to meaning of "next of kin," see § 41-6.1.

Legal Periodicals. —
For article, "Class Gifts in North Carolina — When Do We 'Call The Role'?," see 21 Wake Forest L. Rev. 1 (1985).

For article, "Does the Fee Tail Exist in North Carolina?," see 23 Wake Forest L. Rev. 767 (1988).

CASE NOTES

I. General Consideration.
III. Estate.
IV. Net Estate.
VI. Heirs.
VII. Lineal Descendants.
VIII. Costs of Administration.

I. GENERAL CONSIDERATION.

Quoted in In re Estate of Bryant, 116 N.C. App. 329, 447 S.E.2d 468 (1994).

Cited in Elliot v. Cox, 100 N.C. App. 536, 397 S.E.2d 319 (1990).

III. ESTATE.

"Estate" Defined. — Estate of a decedent includes all property owned by decedent which she may direct to her legatees and devisees under will and which would pass to her heirs and next of kin under laws of intestacy if she died without will. In re Estate of Francis, 327 N.C. 101, 394 S.E.2d 150 (1990).

IV. NET ESTATE.

Property Owned as Tenants by the Entirety. — The value of real property owned by couple as tenants by the entirety should not be included in testatrix's net estate for purposes of the dissent statute. In re Estate of Francis, 94 N.C. App. 744, 381 S.E.2d 484, cert. denied, 325 N.C. 708, 388 S.E.2d 456 (1989).

VI. HEIRS.

Technical Construction of Term "Heirs." — Absent words expressing testatrix' contrary intent, the court would construe the word "heirs" in will in the technical sense. Rawls v. Rideout, 74 N.C. App. 368, 328 S.E.2d 783 (1985).

Consideration of Laws in Effect at Time of Death. — In construing a will with a remainder interest to a class of the testatrix' "heirs," the courts look to the intestacy laws in effect at the testatrix' death to determine who the "heirs" are and the shares which they are entitled to take, unless the language of the will reveals a contrary intent. Rawls v. Rideout, 74 N.C. App. 368, 328 S.E.2d 783 (1985).

For discussion of construction of the phrase "to my nearest (relatives) heirs" in the remainder clause of a devise by testatrix who died in May, 1962, see Rawls v. Rideout, 74 N.C. App. 368, 328 S.E.2d 783 (1985).

VII. LINEAL DESCENDANTS.

Children Distinguished from Others. — The phrase "lineal descendants" generally applies not to distinguish between children of various marriages or out of wedlock, but to distinguish children from other collateral descendants, e.g., nieces and nephews. In re Estate of Edwards, 77 N.C. App. 302, 335 S.E.2d 39 (1985), aff'd, 316 N.C. 698, 343 S.E.2d 913 (1986).

Illegitimate and Adopted Children Included. — The term "lineal descendants" would include even illegitimate children of a deceased female, under § 29-19(a), and clearly includes adopted children, under § 29-17. In re Estate of Edwards, 77 N.C. App. 302, 335 S.E.2d 39 (1985), aff'd, 316 N.C. 698, 343 S.E.2d 913 (1986).

Children Adopted by Wife's Second Husband. — Children born to wife and her first husband became lineal descendants of her second husband upon his adoption of them because they became in law his children. In re Estate of Edwards, 316 N.C. 698, 343 S.E.2d 913, rehearing denied, 317 N.C. 704, 347 S.E.2d 40 (1986).

VIII. COSTS OF ADMINISTRATION.

Costs of administration, as used in subdivision (5) of this section, means those ordinary, usual, and necessary expenses of administering a decedent's estate; a will caveat and its expense is neither of these, for a will caveat is a claim that the will involved is invalid, and its expense is a cost of court taxable against either party, or apportioned among the parties, in the discretion of the court. In re Estate of Ward, 97 N.C. App. 660, 389 S.E.2d 441 (1990).

§ 29-4. Curtesy and dower abolished.

Legal Periodicals. — For article, "Does the Fee Tail Exist in North Carolina?," see 23 Wake Forest L. Rev. 767 (1988).

CASE NOTES

Cited in Marlowe v. Clark, 112 N.C. App. 181, 435 S.E.2d 354 (1993).

§ 29-5. Computation of next of kin.

Cross References. — As to meaning of "next of kin," see § 41-6.1.

Editor's Note. — The case of In re Will of Cobb, 271 N.C. 307, 156 S.E.2d 285 (1967), cited under this section in the main volume, has been abrogated by statute. See § 41-6.1.

§ 29-8. Partial intestacy.

CASE NOTES

Section Codifies Common Law. — This section, which was adopted in 1959, was a codification of the common law. Ferguson v. Croom, 73 N.C. App. 316, 326 S.E.2d 373 (1985).

Section Adopts Majority Rule. — The rule adopted by this section is also in accordance with the rule followed by a majority of the sister states. Ferguson v. Croom, 73 N.C. App. 316, 326 S.E.2d 373 (1985).

This section creates a mandatory plan for disposing of a decedent's property which does not pass by will. It directs that the property pass by intestate succession without regard to the intent expressed by a testator in a will. Ferguson v. Croom, 73 N.C. App. 316, 326 S.E.2d 373 (1985).

Presumption against partial intestacy is merely a rule of construction and cannot have the effect of transferring property in the face of contrary provisions in the will. The presumption must yield when outweighed by manifest and unequivocal intent. McKinney v. Mosteller, 321 N.C. 730, 365 S.E.2d 612 (1988).

Illustrative Case. — Where, as gleaned from will itself, the intent of the testator was that the residue of his estate was to pass to named beneficiaries under the residuary clause of the will only if testator's wife survived him, and she did not, the residue would pass to his heirs at law in accordance with the laws of intestacy as enacted by the legislature. McKinney v. Mosteller, 321 N.C. 730, 365 S.E.2d 612 (1988).

§ 29-9. Inheritance by unborn infant.

Legal Periodicals. — For article, "Class Gifts in North Carolina — When Do We 'Call The Roll'?," see 21 Wake Forest L. Rev. 1 (1985).

For note on the wrongful death of a viable fetus, see 23 Wake Forest L. Rev. 849 (1988).

§ 29-10. Renunciation.

CASE NOTES

A renunciation is not a grant of legal title by the renouncer. It merely triggers a set of statutorily defined legal rights which ultimately determine ownership. Hinson v. Hinson, 80 N.C. App. 561, 343 S.E.2d 266 (1986), decided under this section as it read prior to October 1, 1975.

A renunciation relates back to the death of the testator or intestate. The renouncer never actually holds legal title to the property. Hinson v. Hinson, 80 N.C. App. 561, 343 S.E.2d 266 (1986), decided under this section as it read prior to Oct. 1, 1975.

A parol trust may not be engrafted upon a renounced interest. Hinson v. Hinson, 80 N.C. App. 561, 343 S.E.2d 266 (1986), decided under this section as it read prior to Oct. 1, 1975.

Action Seeking Constructive Trust. — Plaintiff, who sought to assert that defendant unduly influenced his decision to sign a "Petition to Renounce" his interest in will, could maintain an action seeking the declaration of a constructive trust. Hinson v. Hinson, 80 N.C. App. 561, 343 S.E.2d 266 (1986), decided under this section as it read prior to Oct. 1, 1975.

Collateral Attack. — The legality of plaintiff's renunciation under this section as it read prior to Oct. 1, 1975, was a matter before the clerk, who, having exclusive original jurisdiction of the administration of testatrix's estate, allowed plaintiff's "Petition to Renounce." As a party to the original action, plaintiff could not later collaterally attack it. Hinson v. Hinson, 80 N.C. App. 561, 343 S.E.2d 266 (1986), decided under this section as it read prior to Oct. 1, 1975.

ARTICLE 2.

Shares of Persons Who Take upon Intestacy.

§ 29-14. Share of surviving spouse.

(a) Real Property. — The share of the surviving spouse in the real property is:

(1) If the intestate is survived by only one child or by any lineal descendant of only one deceased child, a one-half undivided interest in the real property;

(2) If the intestate is survived by two or more children, or by one child and any lineal descendant of one or more deceased children or by lineal descendants of two or more deceased children, a one-third undivided interest in the real property;

(3) If the intestate is not survived by a child, children or any lineal descendant of a deceased child or children, but is survived by one or more parents, a one-half undivided interest in the real property;

(4) If the intestate is not survived by a child, children or any lineal descendant of a deceased child or children, or by a parent, all the real property.

(b) Personal Property. — The share of the surviving spouse in the personal property is:

(1) If the intestate is survived by only one child or by any lineal descendant of only one deceased child, and the net personal property does not exceed thirty thousand dollars ($30,000) in value, all of the personal property; if the net personal property exceeds thirty thousand dollars ($30,000) in value, the sum of thirty thousand dollars ($30,000) plus one half of the balance of the personal property;

(2) If the intestate is survived by two or more children, or by one child and any lineal descendant of one or more deceased children, or by lineal descendants of two or more deceased children, and the net personal property does not exceed thirty thousand dollars ($30,000) in value, all of the personal property; if the net personal property exceeds thirty thousand dollars ($30,000) in value, the sum of thirty thousand dollars ($30,000) plus one third of the balance of the personal property;

(3) If the intestate is not survived by a child, children, or any lineal descendant of a deceased child or children, but is survived by one or more parents, and the net personal property does not exceed fifty thousand dollars ($50,000) in value, all of the personal property; if the net personal property exceeds fifty thousand dollars ($50,000) in value, the sum of fifty thousand dollars ($50,000) plus one half of the balance of the personal property;

(4) If the intestate is not survived by a child, children, or any lineal descendant of a deceased child or children, or by a parent, all of the personal property. (1959, c. 879, s. 1; 1979, c. 186, s. 1; 1981, c. 69; 1995, c. 262, s. 3.)

Editor's Note. — Session Laws 1979, c. 186, s. 1, which became effective October 1, 1979, and was applicable to the estates of decedents dying on or after that date, rewrote this section to read as follows:

"§ 29-14. *Share of surviving spouse.*

"(a) If the intestate is survived by only one child or by any lineal descendant of only one deceased child, and the net estate does not exceed fifteen thousand dollars ($15,000) in value, the share of the surviving spouse shall be the entire net estate; but if the net estate exceeds fifteen thousand dollars ($15,000) in value, the share of the surviving spouse shall be fifteen thousand dollars ($15,000) in value plus one-half of the balance of the net estate; or

"(b) If the intestate is survived by two or more children or by one child and any lineal descendant of one or more deceased children, or by lineal descendants of two or more deceased children, and the net estate does not exceed fifteen thousand dollars ($15,000) in value, the share of the surviving spouse shall be the entire net estate; but if the net estate exceeds fifteen thousand dollars ($15,000) in value, the share of the surviving spouse shall be fifteen thousand dollars ($15,000) in value plus one-third of the balance of the net estate; or

"(c) If the intestate is not survived by a child, children, or any lineal descendant of a deceased child or children, but is survived by one or more parents, and the net estate does not exceed twenty-five thousand dollars ($25,000) in value, the share of the surviving spouse shall be the entire net estate; but if the net estate exceeds twenty-five thousand dollars ($25,000) in value, the share of the surviving spouse shall be twenty-five thousand dollars ($25,000) in value plus one-half of the balance of the net estate; or

"(d) If the intestate is not survived by a child, children, or any lineal descendant of a deceased child or children, or by a parent, the share of the surviving spouse shall be the entire net estate.

"(e) If under subsections (a), (b), or (c) of this section the surviving spouse is not entitled to the entire net estate, the surviving spouse may elect to take his or her share wholly in personal property, wholly in real property, or partly in personal property and partly in real property in such proportions as the surviving spouse may elect. The election of the surviving spouse may be made by written instrument filed with the personal representative within seven months after the issuance of letters testamentary or letters of administration. By agreement between the personal representative and the surviving spouse, or by order of the Clerk of Superior Court upon good cause shown, the seven month period for the surviving spouse's election may be extended. If the surviving spouse is the personal representative, any extension shall be granted by the Clerk of Superior Court. If no election is filed within seven months, and no extension has been agreed to or ordered, the personal representative shall distribute the share of the surviving spouse wholly in personal property, wholly in real property, or partly in personal property and partly in real property in such proportions as the personal representative may determine."

For the version of this section as in effect prior to the 1979 amendment, see Session Laws 1959, c. 879, s. 1.

Session Laws 1981, c. 69, which became effective March 5, 1981, and is applicable to estates of persons dying on or after that date, again rewrote this section, to read as set out in the main volume.

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, and applicable to estates of persons dying on or after that date, substituted "thirty thousand dollars ($30,000)" for "fifteen thousand dollars ($15,000)" throughout subdivisions (b)(1) and (b)(2) and substituted "fifty thousand dollars ($50,000)" for "twenty-five thousand dollars ($25,000)" throughout subdivision (b)(3).

Legal Periodicals. —

For article, "Class Gifts in North Carolina — When Do We 'Call The Roll'?," see 21 Wake Forest L. Rev. 1 (1985).

CASE NOTES

Quoted in In re Estate of Francis, 327 N.C. 101, 394 S.E.2d 150 (1990).

Stated in In re Estate of Edwards, 316 N.C. 698, 343 S.E.2d 913 (1986).

Cited in Rawls v. Rideout, 74 N.C. App. 368, 328 S.E.2d 783 (1985); In re Estate of Edwards, 77 N.C. App. 302, 335 S.E.2d 39 (1985).

§ 29-15. Shares of others than surviving spouse.

CASE NOTES

When a gift is made to a class of "heirs," the intestacy laws govern not only the identification of the "heirs," but also the shares to which they are entitled. Rawls v. Rideout, 74 N.C. App. 368, 328 S.E.2d 783 (1985).

Per Capita Distribution. — This chapter calls for a per capita distribution of the decedent's real and personal property to all surviving persons in the same degree of relationship to the decedent. The distribution scheme is commonly referred to as "per capita at each generation." Rawls v. Rideout, 74 N.C. App. 368, 328 S.E.2d 783 (1985).

Applied in McDowell v. Estate of Anderson, 69 N.C. App. 725, 318 S.E.2d 258 (1984); Betts v. Parrish, 312 N.C. 47, 320 S.E.2d 662 (1984).

Stated in Hales v. Thompson, 111 N.C. App. 350, 432 S.E.2d 388 (1993); Early v. Bowen, 116 N.C. App. 206, 447 S.E.2d 167 (1994), cert. denied, 339 N.C. 611, 454 S.E.2d 249, — N.C. —, 456 S.E.2d 519 (1995).

Cited in McKinney v. Mosteller, 321 N.C. 730, 365 S.E.2d 612 (1988); State v. Smith, 90 N.C. App. 161, 368 S.E.2d 33 (1988); Brimley v. Logging, 93 N.C. 467, 378 S.E.2d 52 (1989); Stutts v. Adair, 94 N.C. App. 227, 380 S.E.2d 411 (1989); State v. Gilmore, 330 N.C. 167, 409 S.E.2d 888 (1991).

ARTICLE 3.

Distribution among Classes.

§ 29-16. Distribution among classes.

CASE NOTES

When a gift is made to a class of "heirs," the intestacy laws govern not only the identification of the "heirs," but also the shares to which they are entitled. Rawls v. Rideout, 74 N.C. App. 368, 328 S.E.2d 783 (1985).

Per Capita Distribution. — This chapter calls for a per capita distribution of the decedent's real and personal property to all surviving persons in the same degree of relationship to the decedent. The distribution scheme is commonly referred to as "per capita at each generation." Rawls v. Rideout, 74 N.C. App. 368, 328 S.E.2d 783 (1985).

There is no logical reason for the Court of Appeals to favor a per capita distribution over a per stirpes distribution absent the intent of the testatrix as ascertained from the four corners of the will. Lewis v. Ecklin, 110 N.C. App. 73, 428 S.E.2d 855 (1993).

Applied in Ferguson v. Croom, 73 N.C. App. 316, 326 S.E.2d 373 (1985).

Stated in Early v. Bowen, 116 N.C. App. 206, 447 S.E.2d 167 (1994), cert. denied, 339 N.C. 611, 454 S.E.2d 249, — N.C. —, 456 S.E.2d 519 (1995).

Cited in Ladd v. Estate of Kellenberger, 314 N.C. App. 477, 334 S.E.2d 751 (1985); Brimley v. Logging, 93 N.C. App. 467, 378 S.E.2d 52 (1989); Jamin v. Williamson, 94 N.C. App. 699, 381 S.E.2d 345 (1989); Allen v. Piedmond Transp. Servs., Inc., 116 N.C. App. 234, 447 S.E.2d 835 (1994).

ARTICLE 4.

Adopted Children.

§ 29-17. Succession by, through and from adopted children.

CASE NOTES

The term "lineal descendants" is defined at § 29-2(4) as "all children of such person"; this would include even illegitimate children of a deceased female, under § 29-19(a), and clearly includes adopted children, under this section. In re Estate of Edwards, 77 N.C. App. 302, 335 S.E.2d 39 (1985), aff'd, 316 N.C. 698, 343 S.E.2d 913 (1986).

The purpose of subsection (e) of this section is to make it clear that the relationship of parent and child is not severed when the child is adopted by the spouse of the biological parent. In re Estate of Edwards, 316 N.C. 698, 343 S.E.2d 913, rehearing denied, 317 N.C. 704, 347 S.E.2d 40 (1986).

Biological Parent Need Not Join in Spouse's Petition for Adoption of Children. — Subsection (e) of this section and § 48-7(d) were enacted, not to retain adopted children's status as "lineal descendants" by the former marriage, but instead to provide that the parent-child relationship between adopted children and their biological parent is not severed by the parent's spouse's adoption of her children from a former marriage. Since the relationship remains intact in this limited situation, it is not necessary for such a biological parent to become a co-petitioner in her husband's adoption of her legitimate children of a former marriage. This biological parent, however, must consent to the adoption, as must any biological parent who does not come within the ambit of § 48-6. In re Estate of Edwards, 316 N.C. 698, 343 S.E.2d 913, rehearing denied, 317 N.C. 704, 347 S.E.2d 40 (1986).

Wife's failure to "join" in her husband's petition for the adoption of her two minor children by a previous marriage in no way affected her relationship with the children and was immaterial to a determination of her husband's distributive share under § 30-3(b). In re Estate of Edwards, 316 N.C. 698, 343 S.E.2d 913, rehearing denied, 317 N.C. 704, 347 S.E.2d 40 (1986).

Cited in Ladd v. Estate of Kellenberger, 314 N.C. App. 477, 334 S.E.2d 751 (1985).

ARTICLE 5.

Legitimated Children.

§ 29-18. Succession by, through and from legitimated children.

CASE NOTES

Cited in Hayes v. Dixon, 83 N.C. App. 52, 348 S.E.2d 609 (1986).

ARTICLE 6.

Illegitimate Children.

§ 29-19. Succession by, through and from illegitimate children.

Legal Periodicals. —

For 1984 survey, "Intestate Succession of Illegitimate Children in North Carolina," see 63 N.C.L. Rev. 1274 (1985).

CASE NOTES

In General. — Illegitimate children may inherit from their putative fathers if they have been legitimated by one of the methods established in §§ 49-10 through 49-14, or if paternity has been established in an action for criminal nonsupport. Helms v. Young-Woodard, 104 N.C. App. 746, 411 S.E.2d 184 (1991), cert. denied, 331 N.C. 117, 414 S.E.2d 756, — U.S. —, 113 S. Ct. 91, 121 L. Ed. 2d 53 (1992).

Birth certification amendment application form did not meet requirements of subsection (b) where it contained no statement by the putative father or anyone else that he was the father of the child, and even if his signature in the blank space involved could be construed to be an unambiguous acknowledgment of paternity, he did not swear to it before any official authorized to administer oaths. In re Will of Bunch, 86 N.C. App. 463, 358 S.E.2d 118 (1987).

The term "lineal descendants" is defined at § 29-2(4) as "all children of such person"; this would include even illegitimate children of a deceased female, under subsection (a) of this section, and clearly includes adopted children, pursuant to § 29-17. In re Estate of Edwards, 77 N.C. App. 302, 335 S.E.2d 39 (1985), aff'd, 316 N.C. 698, 343 S.E.2d 913 (1986).

Compliance with Section Essential. — Where there has been no compliance with this section, illegitimate child has no right to inherit from deceased putative father. Hayes v. Dixon, 83 N.C. App. 52, 348 S.E.2d 609 (1986), cert. denied and appeal dismissed, 319 N.C. 224, 353 S.E.2d 402, cert. denied, 484 U.S. 824, 108 S. Ct. 88, 98 L. Ed. 2d 50 (1987).

Plea of Guilty in Bastardy Action as Basis for Inheritance by Child. — An illegitimate child may inherit, through intestate succession, from the estate of a father who acknowledged paternity to the child by pleading guilty in a criminal bastardy action. Sanders v. Brantley, 71 N.C. App. 797, 323 S.E.2d 426 (1984).

This section confers upon illegitimate children same rights enjoyed by legitimate children under laws of intestate succession once there is proper adjudication or acknowledgment of paternity. Notification of the personal representative within six months of published notice to creditors does not establish or define the illegitimate child's right, but merely sets a time limitation for an illegitimate child to seek its enforcement. Jefferys v. Tolin, 90 N.C. App. 233, 368 S.E.2d 201 (1988).

Subsection (b) is Statute of Limitation. — The six-month limitation period in subsection (b), relating to notice of the claim of an illegitimate child to take from father's estate, is a statute of limitation which is subject to being tolled under the provisions of § 1-17. Jefferys v. Tolin, 90 N.C. App. 233, 368 S.E.2d 201 (1988).

Applied in Poteat v. Robinson, 90 N.C. App. 764, 370 S.E.2d 61 (1988).

Cited in Brimley v. Logging, 93 N.C. App. 467, 378 S.E.2d 52 (1989).

ARTICLE 8.

Election to Take Life Interest in Lieu of Intestate Share.

§ 29-30. Election of surviving spouse to take life interest in lieu of intestate share provided.

Legal Periodicals. —

For comment, "Offer to Purchase and Contract: Buyer Beware," see 8 Campbell L. Rev. 473 (1986).

For comment, "The Uniform Probate Code's 'Augmented Estate' Concept: A Remedy for the North Carolina Dissent Statute," see 12 Campbell L. Rev. 425 (1990).

Chapter 30.

Surviving Spouses.

Article 4.

Year's Allowance.

Part 1. Nature of Allowance.

Sec.
30-15. When spouse entitled to allowance.
30-17. When children entitled to an allowance.

Part 2. Assigned by Magistrate.

Sec.
30-26. When above allowance is in full.

Part 3. Assigned in Superior Court.

30-29. What complaint must show.

ARTICLE 1.

Dissent from Will.

§ 30-1. Right of dissent.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Cited in Brantley v. Watson, 113 N.C. App. 234, 438 S.E.2d 211 (1994).

§ 30-2. Time and manner of dissent.

CASE NOTES

Statute Tolled by Disability. — The six-month period of limitation in this section for dissenting from a will in probate is a statute of limitations which can be tolled by § 1-17 for a disability. In re Estate of Owens, 117 N.C. App. 118, 450 S.E.2d 2 (1994).

ARTICLE 4.

Year's Allowance.

Part 1. Nature of Allowance.

§ 30-15. When spouse entitled to allowance.

Every surviving spouse of an intestate or of a testator, whether or not he has dissented from the will, shall, unless he has forfeited his right thereto as provided by law, be entitled, out of the personal property of the deceased spouse, to an allowance of the value of ten thousand dollars ($10,000) for his support for one year after the death of the deceased spouse. Such allowance shall be exempt from any lien, by judgment or execution, acquired against the property of the deceased spouse, and shall, in cases of testacy, be charged against the share of the surviving spouse. (1868-9, c. 93, s. 81; 1871-2, c. 193, s. 44; 1880, c. 42; Code, s. 2116; 1889, c. 499, s. 2; Rev., s. 3091; C.S., s. 4108; 1953, c. 913, s. 1; 1961, c. 316, s. 1; c. 749, s. 1; 1969, c. 14; 1981, c. 413, s. 1; 1995, c. 262, s. 4.)

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, and applicable to estates of persons dying on or after that date, substituted "ten thousand dollars ($10,000)" for "five thousand dollars ($5,000)" in the first sentence.

CASE NOTES

Quoted in Brantley v. Watson, 113 N.C. App. 234, 438 S.E.2d 211 (1994).

§ 30-17. When children entitled to an allowance.

Whenever any parent dies leaving any child under the age of 18 years, including an adopted child or a child with whom the widow may be pregnant at the death of her husband, or a child who is less than 22 years of age and is a full-time student in any educational institution, or a child under 21 years of age who has been declared mentally incompetent, or a child under 21 years of age who is totally disabled, or any other person under the age of 18 years residing with the deceased parent at the time of death to whom the deceased parent or the surviving parent stood in loco parentis, every such child shall be entitled, besides its share of the estate of such deceased parent, to an allowance of two thousand dollars ($2,000) for its support for the year next ensuing the death of such parent, less, however, the value of any articles consumed by said child since the death of said parent. Such allowance shall be exempt from any lien by judgment or execution against the property of such parent. The personal representative of the deceased parent, within one year after the parent's death, shall assign to every such child the allowance herein provided for; but if there is no personal representative or if he fails or refuses to act within 10 days after written request by a guardian or next friend on behalf of such child, the allowance may be assigned by a magistrate, upon application of said guardian or next friend.

If the child resides with the widow of the deceased parent at the time such allowance is paid, the allowance shall be paid to said widow for the benefit of said child. If the child resides with its surviving parent who is other than the widow of the deceased parent, such allowance shall be paid to said surviving parent for the use and benefit of such child, regardless of whether the deceased died testate or intestate or whether the widow dissented from the will. Provided, however, the allowance shall not be available to an illegitimate child of a deceased father, unless such deceased father shall have recognized the paternity of such illegitimate child by deed, will or other paper-writing. If the child does not reside with a parent when the allowance is paid, it shall be paid to its general guardian, if any, and if none, to the clerk of the superior court who shall receive and disburse same for the benefit of such child. (1889, c. 496; Rev., s. 3094; C.S., s. 4111; 1939, c. 396; 1953, c. 913, s. 2; 1961, c. 316, s. 2; c. 749, s. 3; 1969, c. 269; 1971, c. 528, s. 22; 1973, c. 1411; 1975, c. 259; 1981, c. 413, s. 2; c. 599, s. 7; 1995, c. 262, s. 5.)

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, and applicable to estates of persons dying on or after that date, substituted "two thousand dollars ($2,000)" for "one thousand dollars ($1,000)" in the first sentence of the first paragraph.

Part 2. Assigned by Magistrate.

§ 30-26. When above allowance is in full.

If the estate of a deceased be insolvent, or if his personal estate does not exceed ten thousand dollars ($10,000), the allowances for the year's support of the surviving spouse and the children shall not, in any case, exceed the value prescribed in G.S. 30-15 and [G.S.] 30-17; and the allowances made to them as above prescribed shall preclude them from any further allowances. (1868-9, c. 93, s. 19; Code, s. 2127; Rev., s. 3103; C.S., s. 4120; 1961, c. 749, s. 10; 1981, c. 413, s. 3; 1995, c. 262, s. 6.)

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, and applicable to estates of persons dying on or after that date, substituted "ten thousand dollars ($10,000)" for "five thousand dollars ($5,000)".

Part 3. Assigned in Superior Court.

§ 30-29. What complaint must show.

In the complaint the plaintiff shall set forth, besides the facts entitling plaintiff to a year's support and the value of the support claimed, the further facts that the estate of the decedent is not insolvent, and that the personal estate of which he died possessed exceeded ten thousand dollars ($10,000), and also whether or not an allowance has been made to plaintiff and the nature and value thereof. (1868-9, c. 93, s. 22; Code, s. 2130; Rev., s. 3106; C.S., s. 4123; 1961, c. 749, s. 12; 1981, c. 413, s. 4; 1995, c. 262, s. 7.)

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, and applicable to estates of persons dying on or after that date, substituted "ten thousand dollars ($10,000)" for "five thousand dollars ($5,000)".

Chapter 31.

Wills.

Article 2.

Revocation of Will.

Sec.
31-5.4. Revocation by divorce or annulment; revival.
31-5.5. After-born or after-adopted child; illegitimate child; effect on will.
31-5.8. Revival of revoked will.

Article 5.

Probate of Will.

31-23. [Repealed.]
31-24. Examination of witnesses by affidavit.

Sec.
31-25, 31-25.1. [Repealed.]
31-27. Certified copy of will of nonresident recorded.

Article 6.

Caveat to Will.

31-37.1. Parties may enter into a settlement agreement.

Article 7.

Construction of Will.

31-42. Failure of devises and legacies by lapse or otherwise; renunciation.

ARTICLE 1.

Execution of Will.

§ 31-1. Who may make will.

Legal Periodicals. —

For note as to the transfer of land by wills in light of Stephenson v. Rowe, 315 N.C. 330, 338 S.E.2d 301 (1986), see 65 N.C.L. Rev. 1488 (1987).

For article, "Abolishing the Attestation Requirement for Wills," see 68 N.C.L. Rev. 541 (1990).

CASE NOTES

Primary object in interpreting a will is to give effect to the intention of the testator. Misenheimer v. Misenheimer, 312 N.C. 692, 325 S.E.2d 195, rehearing denied, 313 N.C. 515, 334 S.E.2d 778 (1985).

Presumption Against Intestacy. — It is a long-standing policy of the State of North Carolina to construe a will with the presumption that the testator did not intend to die intestate with respect to any part of his property. Misenheimer v. Misenheimer, 312 N.C. 692, 325 S.E.2d 195, rehearing denied, 313 N.C. 515, 334 S.E.2d 778 (1985).

Applied in Holloway v. Wachovia Bank & Trust Co., 104 N.C. App. 631, 410 S.E.2d 915 (1991).

§ 31-3.1. Will invalid unless statutory requirements complied with.

CASE NOTES

Codicil to a Will. — In North Carolina, a codicil to a will must be executed with the same formalities as the will. Consequently, a testamentary instrument that fails to follow the prescribed formalities is void. Leggett v. Rose, 776 F. Supp. 229 (E.D.N.C. 1991).

§ 31-3.3. Attested written will.

CASE NOTES

I. General Consideration.
II. Signing by or for Testator.
III. Attestation by Witnesses.

I. GENERAL CONSIDERATION.

For a will to be admitted to probate, § 31-18.1(a)(1) requires that the will meet the requirements of this section and that two of the attesting witnesses testify before the court. In re Will of Everhart, 88 N.C. App. 572, 364 S.E.2d 173, cert. denied, 322 N.C. 112, 367 S.E.2d 910 (1988).

A codicil must be executed, etc. — In accord with main volume. See In re Will of King, 80 N.C. App. 471, 342 S.E.2d 394, cert. denied, 317 N.C. 704, 347 S.E.2d 43 (1986).

Quoted in Brickhouse v. Brickhouse, 104 N.C. App. 69, 407 S.E.2d 607 (1991).

Cited in In re Will of Jarvis, 107 N.C. App. 34, 418 S.E.2d 520 (1992).

II. SIGNING BY OR FOR TESTATOR.

Assistance by Attorney. — Attorney's assisting testator to form his mark and signing testator's name legibly beside each mark did not disqualify him as a witness. In re Will of Jarvis, 334 N.C. 140, 430 S.E.2d 922 (1993).

Evidence that testator made his mark on codicil in the presence of the witnesses indicates that the instrument was his, and is sufficient to imply a request that they attest his signature. In re Will of King, 80 N.C. App. 471, 342 S.E.2d 394, cert. denied, 317 N.C. 704, 347 S.E.2d 43 (1986).

III. ATTESTATION BY WITNESSES.

Witnesses Need Not Sign in Presence of Each Other. —

Where witness who signed the will in a location different from the other two witnesses testified and stated in her affidavit that she was a witness to the testator's mark at the request of the testator, who declared the document to be his will, the trial court did not err in finding that witness was an attesting witness. Brickhouse v. Brickhouse, 110 N.C. App. 560, 430 S.E.2d 446 (1993).

§ 31-3.4. Holographic will.

CASE NOTES

II. Testamentary Intent.
IV. Found Among Valuable Papers, etc.

II. TESTAMENTARY INTENT.

Evidence of Testamentary Intent, etc. —

An instrument may not be probated as a testamentary disposition unless there is evidence that it was written with testamentary intent, that is, that the maker intended that the paper itself should operate as a will or codicil to take effect upon his death. Stephens v. McPherson, 88 N.C. App. 251, 362 S.E.2d 826 (1987).

Where Testamentary Intent Must Appear. —

In accord with the main volume. See Stephens v. McPherson, 88 N.C. App. 251, 362 S.E.2d 826 (1987).

IV. FOUND AMONG VALUABLE PAPERS, ETC.

Evidence of Finding Among Valuables. —

Evidence as to whether the document in question was found among the valuable papers and effects of the deceased or in a safe place where it was deposited by her, in satisfaction of subdivision (a)(3) of this section, was sufficient to support the jury's determination that it was a valid holographic will. Stephens v. McPherson, 88 N.C. App. 251, 362 S.E.2d 826 (1987).

§ 31-4. Execution of power of appointment by will.

Legal Periodicals. — For note, "Powers of Appointment—Does a General Residuary Clause Fulfill a Specific Reference Requirement?," see 65 N.C.L. Rev. 1475 (1987).

CASE NOTES

A provision calling for reference to a power of appointment does not concern the "execution and attestation" of a will within the meaning of this section. First Citizens Bank & Trust Co. v. Fleming, 77 N.C. App. 568, 335 S.E.2d 515 (1985).

In order to exercise a power of appointment calling for specific reference to the power before the power may be exercised, some reference to the power must be made. First Citizens Bank & Trust Co. v. Fleming, 77 N.C. App. 568, 335 S.E.2d 515 (1985).

ARTICLE 2.

Revocation of Will.

§ 31-5.4. Revocation by divorce or annulment; revival.

Dissolution of marriage by absolute divorce or annulment after making a will does not revoke the will of any testator but, unless otherwise specifically provided in the will, it revokes all provisions in the will in favor of the testator's former spouse or purported former spouse, including, but not by way of limitation, any provision conferring a general or special power of appointment on the former spouse or purported former spouse and any appointment of the former spouse or purported former spouse as executor, trustee, conservator, or guardian. If provisions are revoked solely by this section, they are revived by the testator's remarriage to the former spouse or purported former spouse. (1953, c. 1098, s. 6; 1977, c. 74, s. 3; 1991, c. 587, s. 1.)

§ 31-5.5. After-born or after-adopted child; illegitimate child; effect on will.

(a) A will shall not be revoked by the subsequent birth of a child to the testator, or by the subsequent adoption of a child by the testator, or by the subsequent entitlement of an after-born illegitimate child to take as an heir of the testator pursuant to the provisions of G.S. 29-19(b), but any after-born, after-adopted or entitled after-born illegitimate child shall have the right to share in the testator's estate to the same extent he would have shared if the testator had died intestate unless:

(1) The testator made some provision in the will for the child, whether adequate or not;

(2) It is apparent from the will itself that the testator intentionally did not make specific provision therein for the child;

(3) The testator had children living when the will was executed, and none of the testator's children actually take under the will;

(4) The surviving spouse receives all of the estate under the will;

(5) The testator made provision for the child that takes effect upon the death of the testator, whether adequate or not.

(b) The provisions of G.S. 28A-22-2 shall be construed as being applicable to after-adopted children and to after-born children, whether legitimate or entitled illegitimate.

(c) The terms "after-born," "after-adopted" and "entitled after-born" as used in this section refer to children born, adopted or entitled subsequent to the execution of the will. (1868-9, c. 113, s. 62; Code, s. 2145; Rev., s. 3145; C.S., s. 4169; 1953, c. 1098, s. 7; 1955, c. 541; 1973, c. 1062, s. 2; 1985, c. 689, s. 9; 1995, c. 161, s. 1.)

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, and applicable to estates of decedents dying on or after that date, deleted "or" from the end of subdivision (a)(1); and added subdivisions (a)(3), (a)(4), and (a)(5), and made related changes.

CASE NOTES

A testator is not required to mention by name or make some provision for a child in order to disinherit that child under North Carolina law, even if the child is born or adopted after the will is made. Ladd v. Estate of Kellenberger, 314 N.C. 477, 334 S.E.2d 751 (1985).

Adequacy of Provision for After-Born Child. —

As long as a testator makes some provision in the will for an after-born child, whether adequate or not, the child has no right to take an intestate share of the testator's estate, and a class gift constituted a provision for an afterborn child, even though the gift was contingent. Mason v. Stanimer, 102 N.C. App. 673, 403 S.E.2d 605 (1991).

§ 31-5.8. Revival of revoked will.

No will or any part thereof that has been in any manner revoked can, except as provided in G.S. 31-5.4, be revived otherwise than by a reexecution thereof, or by the execution of another will in which the revoked will or part thereof is incorporated by reference. (1953, c. 1098, s. 10; 1991, c. 587, s. 2.)

ARTICLE 3.

Witnesses to Will.

§ 31-8.1. Who may witness.

Legal Periodicals. — For article, "Abolishing the Attestation Requirement for Wills," see 68 N.C.L. Rev. 541 (1990).

§ 31-10. Beneficiary competent witness; when interest rendered void.

CASE NOTES

Quoted in Brickhouse v. Brickhouse, 104 N.C. App. 69, 407 S.E.2d 607 (1991).

ARTICLE 4A.

Self-Proved Wills.

§ 31-11.6. How attested wills may be made self-proved.

Legal Periodicals. — For article, "Abolishing the Attestation Requirement for Wills," see 68 N.C.L. Rev. 541 (1990).

ARTICLE 5.

Probate of Will.

§ 31-12. Executor may apply for probate.

CASE NOTES

Jurisdiction of Clerk. — The clerk of the superior court has exclusive and original jurisdiction over the probate of wills. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801 (1987).

Primary object in interpreting a will is to give effect to the intention of the testator. Misenheimer v. Misenheimer, 312 N.C. 692, 325 S.E.2d 195, rehearing denied, 313 N.C. 515, 334 S.E.2d 778 (1985).

Presumption Against Intestacy. — It is a long-standing policy of the State of North Carolina to construe a will with the presumption that the testator did not intend to die intestate with respect to any part of his property. Misenheimer v. Misenheimer, 312 N.C. 692, 325 S.E.2d 195, rehearing denied, 313 N.C. 515, 334 S.E.2d 778 (1985).

§ 31-18.1. Manner of probate of attested written will.

CASE NOTES

For a will to be admitted to probate, subdivision (a)(1) of this section requires that the will meet the requirements of § 31-3.3 and that two of the attesting witnesses testify before the court. In re Will of Everhart, 88 N.C. App. 572, 364 S.E.2d 173, cert. denied, 322 N.C. 112, 367 S.E.2d 910 (1988).

§ 31-18.2. Manner of probate of holographic will.

CASE NOTES

Indicia of Holographic Will Held Sufficient. — Where caveators presented testimony that holographic writings were found among papers which included the titles to testator's car and housetrailer, copies of property deeds, health insurance papers, and cancelled bank notes, further testimony that testator duly executed his signature on the writings before a notary public, and the testimony of three witnesses who testified they were familiar with both the handwriting and signature of the testator and that they believed the subject writings and signatures to be in testator's own hand, caveators presented sufficient indicia of a holographic will under section 31-3.4 and they satisfied the requirements of this section; therefore, propounders' motion for directed verdict was properly denied. In re Will of Penley, 95 N.C. App. 655, 383 S.E.2d 385, cert. denied, 326 N.C. 48, 389 S.E.2d 93 (1990).

§ 31-23: Repealed by Session Laws 1987, c. 78, s. 1, effective October 1, 1987.

§ 31-24. Examination of witnesses by affidavit.

(a) The examination of witnesses to a will may be taken and subscribed in the form of an affidavit before a notary public or other person who is authorized to administer oaths in the jurisdiction where the examination is held.

(b) A photographic copy of the original will certified to be a true and exact copy thereof by the clerk of superior court of the county in which the will is to be probated may be used in the examination of the witnesses in the procedures set out in subsection (a); provided, the said clerk has in his possession the original will at the time of examination of the witnesses.

(c) Affidavits taken in accordance with subsection (a) shall be transmitted by the person taking the affidavit to the clerk of superior court of the county in which the will is to be probated.

(d) Testimony submitted in accordance with subsection (a) is competent in regard to all requirements of G.S. 31-3.3 and to establish that a will was executed in compliance with the requirements of G.S. 31-3.3.

(e) Nothing in this section is to limit or otherwise affect the authority of a clerk of superior court in the exercise of his authority as judge of probate under G.S. 28A-2-1 to:

(1) Issue subpoenas under G.S. 7A-103; or

(2) Order the taking of depositions of witnesses. (1917, c. 183; C.S., s. 4149; 1933, c. 114; 1957, c. 587, ss. 1, 1A; 1979, c. 226, s. 1; 1987, c. 78, s. 2.)

§§ 31-25, 31-25.1: Repealed by Session Laws 1987, c. 78, s. 1, effective October 1, 1987.

§ 31-27. Certified copy of will of nonresident recorded.

(a) Subject to the provisions of subsection (b), if the will of a citizen or subject of another state or country is probated in accordance with the laws of that jurisdiction and a duly certified copy of the will and the probate proceedings are produced before a clerk of superior court of any county wherein the testator had property, the copy of the will shall be probated as if it were the original. If the jurisdiction is within the United States, the copy of the will and the probate proceedings shall be certified by the clerk of the court wherein the will was probated. If the jurisdiction is outside the United States, the copy of the will and probate proceedings shall be certified by any ambassador, minister, consul or commercial agent of the United States under his official seal.

(b) For a copy of a will probated under the provisions of subsection (a) to be valid to pass title to or otherwise dispose of real estate in this State, the execution of said will according to the laws of this State must appear affirmatively, to the satisfaction of the clerk of the superior court of the county in which such will is offered for probate, from the testimony of a witness or witnesses to such will, or from findings of fact or recitals in the order of probate, or otherwise in such certified copy of the will and probate proceedings.

(c) If the execution of the will in accordance with the laws of this State does not appear as required by subsection (b), the clerk before whom the copy is exhibited shall have power to take proof as prescribed in G.S. 31-24, and the will may be adjudged duly proved, and if so proved, the will shall be recorded as herein provided.

(d) Any copy of a will of a nonresident heretofore allowed, filed and recorded in this State in compliance with the foregoing shall be valid to pass title to or otherwise dispose of real estate in this State. (C.C.P., s. 444; 1883, c. 144; Code, s. 2156; 1885, c. 393; Rev., s. 3133; C.S., s. 4152; 1941, c. 381; 1965, c. 995; 1987, c. 78, s. 3.)

CASE NOTES

Applied in Brickhouse v. Brickhouse, 104 N.C. App. 69, 407 S.E.2d 607 (1991).

ARTICLE 6.

Caveat to Will.

§ 31-32. When and by whom caveat filed.

CASE NOTES

I. General Consideration.
II. Interested Persons.

I. GENERAL CONSIDERATION.

Filing of a caveat is the customary and statutory procedure, etc. — Questions as to the construction of a will may be brought in a declaratory judgment action; however, there are limitations to the use of a declaratory judgment action. Thus, a caveat proceeding and not declaratory judgment was appropriate to determine the validity of document. Rogel v. Johnson, 114 N.C. App. 239, 441 S.E.2d 558, cert. denied, 336 N.C. 609, 447 S.E.2d 401 (1994).

Superior Court Acquires No Jurisdiction When Purported Caveat Is Fatally Defective from Inception. — Although it is often stated that, when a caveat is filed superior court acquires jurisdiction of whole matter in controversy, such a pronouncement does not alter affirmative statutory requirement that caveat proceedings can only be instituted by due filing of cause before clerk of superior court. When purported caveat is fatally defective from its inception, superior court acquires no jurisdiction over cause. Casstevens v. Wagoner, 99 N.C. App. 337, 392 S.E.2d 776 (1990).

The Contest Is a Special Proceeding In Rem. —

A caveat is an in rem proceeding, perhaps more strictly so regarded than any other proceeding with which the courts deal. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801 (1987).

The rules peculiar to a caveat stem from the in rem nature of the proceeding. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801 (1987).

Nonsuit Cannot Be Taken. —

Because the caveat proceeding is in rem, the proceeding must go on until the issue devisavit vel non is appropriately answered; nonsuit cannot be taken by the propounders or the caveators. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801 (1987).

Propounder Functions as Plaintiff. — It is the propounder, and not the caveator, who functions as a plaintiff in a caveat proceeding. In re Will of Parker, 76 N.C. App. 594, 334 S.E.2d 97, cert. denied, 315 N.C. 185, 337 S.E.2d 859 (1985).

An attack upon the validity of a will must be direct and in the form of a caveat. In re Will of Hester, 320 N.C. 738, 360 S.E.2d 801, cert. denied, 321 N.C. 300, 362 S.E.2d 780 (1987).

The trial court may not exclude from the caveat proceeding consideration of any script offered by an interested party which is relevant to the issue devisavit vel non. However, it does not mandate that the issues relating to all scripts be considered simultaneously. In re Will of Hester, 320 N.C. 738, 360 S.E.2d 801, cert. denied, 321 N.C. 300, 362 S.E.2d 780 (1987).

Burden of Proof. — Although a caveat proceeding is an in rem proceeding without a plaintiff and a defendant as such, it is the propounder who has the initial burden of proof, namely, to prove that the instrument in question was executed with the proper formalities required by law. Once this has been established, the burden shifts to the caveator to show that the execution of the will was procured by undue influence. In re Will of Parker, 76 N.C. App. 594, 334 S.E.2d 97, cert. denied, 315 N.C. 185, 337 S.E.2d 859 (1985).

Where plaintiffs attempted to initiate purported caveat proceedings directly in superior court as part of attack on validity of a deed, trial court had no subject matter jurisdiction to determine will's validity. Casstevens v. Wagoner, 99 N.C. App. 337, 392 S.E.2d 776 (1990).

Applied in Lash ex rel. Wilson v. Lash, 107 N.C. App. 755, 421 S.E.2d 615 (1992).

II. INTERESTED PERSONS.

This section affords protection to any interested persons who do not receive notice. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801 (1987).

Executor. — A named executor is not a person interested in the event of the caveat proceeding within the meaning of the dead man's statute. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801 (1987).

Membership in Congregation. — Membership in a church congregation, albeit distinguished membership, is too tenuous an interest to come within the meaning of the dead man's statute. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801 (1987).

§ 31-33. Bond given and cause transferred to trial docket.

Cross References. — For provisions requiring clerk to transfer issues of fact to civil issue docket, see § 1-273.

CASE NOTES

Court Had No Jurisdiction to Determine Will's Validity Where Plaintiff's Attempt to Initiate Caveat Was Part of Attack on Deed. — Where plaintiffs attempted to initiate purported caveat proceedings directly in superior court as part of attack on validity of a deed, trial court had no subject matter jurisdiction to determine question of will's validity. Casstevens v. Wagoner, 99 N.C. App. 337, 392 S.E.2d 776 (1990).

Although it is often stated that, when a caveat is filed superior court acquires jurisdiction of whole matter in controversy, such a pronouncement does not alter affirmative statutory requirement that caveat proceedings can only be instituted by due filing of cause before clerk of superior court. When a purported caveat is fatally defective from its inception, superior court acquires no jurisdiction over cause. Casstevens v. Wagoner, 99 N.C. App. 337, 392 S.E.2d 776 (1990).

Clerk's Findings Not Binding When Issue of Fact Raised. — Interested parties in a proceeding before a clerk of the Superior Court to probate a will in solemn form are not bound by the findings of the clerk where an issue of fact is raised by the parties. In re Will of Ellis, 235 N.C. 27, 69 S.E.2d 25 (1952).

Proceedings Transferred, etc. — When a caveat is filed, the clerk of superior court transfers the proceeding to the civil issue docket of the superior court, to the end that the issue devisavit vel non may be tried by a jury. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801 (1987).

Caveat filed without compliance with bond requirement under this section is not a valid attack upon the will. In re Will of Parker, 76 N.C. App. 594, 334 S.E.2d 97, cert. denied, 315 N.C. 185, 337 S.E.2d 859 (1985).

Who Are Necessary Parties. — Persons who qualify as persons interested in the estate are not necessarily equivalent to necessary parties. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801 (1987).

Discretion of Court as to Necessary Parties. — The decision whether certain persons are necessary parties to the caveat proceeding is within the court's discretion. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801 (1987).

Persons who will share in the estate under the law governing intestacy in case a script which purports to be the will of the deceased is adjudged invalid are proper persons to receive notice and participate in the proceedings within the meaning of this section. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801 (1987).

Beneficiaries Under Previous Will. — Where caveators alleged that probated will was invalid on grounds of undue influence and lack of mental capacity and that they were beneficiaries under a will made at a time when the testator possessed mental capacity, if the facts were as caveators alleged, they were interested in the estate. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801 (1987).

Heirs at law who have no knowledge of a caveat proceeding and who were not cited under this section are not estopped to file a second caveat, nor are they bound by the former judgment sustaining the validity of the script. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801 (1987).

§ 31-34. Prosecution bond required in actions to contest wills.

CASE NOTES

This section is not applicable to a caveator. Therefore, a prosecution bond cannot be required of a caveator in an action to contest a will. In re Will of Parker, 76 N.C. App. 594, 334 S.E.2d 97, cert. denied, 315 N.C. 185, 337 S.E.2d 859 (1985).

§ 31-36. Caveat suspends proceedings under will.

CASE NOTES

Stated in In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643 (1987).

§ 31-37. Superior court clerks to enter notice of caveat on will book; final judgment also to be entered.

CASE NOTES

Cited in In re Estate of Peebles, 118 N.C. App. 296, 454 S.E.2d 854 (1995).

§ 31-37.1. Parties may enter into a settlement agreement.

Prior to an entry of judgment by the superior court in a caveat proceeding, the parties may enter into a settlement agreement, whereupon judgment may be entered by the court, without a verdict by a jury, in accordance with the terms of the settlement agreement, either sustaining or setting aside the contested will. (1989 (Reg. Sess., 1990), c. 949, s. 1.)

Editor's Note. — Session Laws 1989 (Reg. Sess., 1990), c. 949, s. 2 made this section effective October 1, 1990, and applicable to all caveats to wills whether filed on, before or after that date.

ARTICLE 7.

Construction of Will.

§ 31-38. Devise presumed to be in fee.

Legal Periodicals. — For article, "Does the Fee Tail Exist in North Carolina?," see 23 Wake Forest L. Rev. 767 (1988).

CASE NOTES

I. General Consideration.
II. Rules of Construction.
III. Illustrative Cases.

I. GENERAL CONSIDERATION.

The presumption created by this section, etc. —

The rule that a devise of the "use of" property is the equivalent of a devise in fee ... has no application when a will shows an intent to pass an interest that is less than a fee. Cassada v. Cassada, 103 N.C. App. 129, 404 S.E.2d 491, cert. denied, 329 N.C. 786, 408 S.E.2d 516 (1991).

Cited in Brinkley v. Day, 88 N.C. App. 101, 362 S.E.2d 587 (1987).

II. RULES OF CONSTRUCTION.

Intention of Testator. —

Primary object in interpreting a will is to give effect to the intention of the testator. Misenheimer v. Misenheimer, 312 N.C. 692, 325 S.E.2d 195, rehearing denied, 313 N.C. 515, 334 S.E.2d 778 (1985).

Presumption Against Intestacy. — It is a long-standing policy of the State of North Carolina to construe a will with the presumption that the testator did not intend to die intestate with respect to any part of his property. Misenheimer v. Misenheimer, 312 N.C. 692, 325 S.E.2d 195, rehearing denied, 313 N.C. 515, 334 S.E.2d 778 (1985).

III. ILLUSTRATIVE CASES.

"Cash." — The word "cash" is not such a technical one that it will have the same definite and precise meaning in all circumstances. Barnes v. Evans, 102 N.C. App. 428, 402 S.E.2d 164 (1991), aff'd, 331 N.C. 111, 413 S.E.2d 797 (1992).

The word "cash" as used in a will includes bank accounts, both checking and savings and includes certificates of deposit. Barnes v. Evans, 102 N.C. App. 428, 402 S.E.2d 164 (1991), aff'd, 331 N.C. 111, 413 S.E.2d 797 (1992).

Use of the words "other cash," as used in a will, will not be interpreted by resorting to a narrow, technical definition or interpretation. Courts must look for the meaning of these words according to the subject treated and the context in which they were used. The intention of the testator is the polar star which must guide the courts in the interpretation of wills. Barnes v. Evans, 102 N.C. App. 428, 402 S.E.2d 164 (1991), aff'd, 331 N.C. 111, 413 S.E.2d 797 (1992).

"Remaining cash and bonds" included certificates of deposit. Barnes v. Evans, 102 N.C. App. 428, 402 S.E.2d 164 (1991), aff'd, 331 N.C. 111, 413 S.E.2d 797 (1992).

Language Insufficient to Show Intent to Pass Less Than Fee Simple Estate. —
The language "provided, that if she own the property or any part thereof at her death, the same shall descend to the children born of her body, or the heirs of such children" did not show the intestator's intention to convey a life estate. An unrestricted or general devise of real property, to which is affixed, either specifically or by implication, an unlimited power of disposition in the first taker, conveys the fee and a subsequent clause purporting to dispose of what remains at his death is not allowed to defeat the devise or limit it to a life estate. Leonard v. Dillard, 87 N.C. App. 79, 359 S.E.2d 497 (1987); See Osborne v. Hodgin, 98 N.C. App. 111, 389 S.E.2d 629 (1990).

Devise Creating Life Estate. — Decedent's unrestricted devise of certain property to plaintiff in Item 2 was a devise in fee simple and the later devise of the property to defendants in Item 7 did not limit plaintiff's estate to a life estate. Coble v. Patterson, 114 N.C. App. 447, 442 S.E.2d 119 (1994).

§ 31-40. What property passes by will.

Legal Periodicals. —
For note as to the transfer of land by wills in light of Stephenson v. Rowe, 315 N.C. 330, 338 S.E.2d 301 (1986), see 65 N.C.L. Rev. 1488 (1987).

§ 31-41. Will relates to death of testator.

CASE NOTES

Agreement to Sell Made Before Testator's Death. — Devise in will was not adeemed because of agreement to sell made before death when at the time of the testator's death, he retained legal title to the real estate. Morrison v. Grandy, 115 N.C. App. 170, 443 S.E.2d 751 (1994).

§ 31-42. Failure of devises and legacies by lapse or otherwise; renunciation.

(a) Unless a contrary intent is indicated by the will, where a devise or legacy of any interest in property is given to a person as an individual or as a member of a class and the person dies survived by qualified issue before the testator dies, then the qualified issue of such deceased person that survive the testator shall represent the deceased person, and the entire interest that the deceased person would have taken had he survived the testator shall pass by substitution to his qualified issue. The qualified issue shall take pursuant to the preceding sentence regardless of whether or not the deceased person dies before or after the making of the will. Where a devise or legacy of any interest in property is given to a person as a member of a class and the person predeceases the testator and is not survived by qualified issue, then, unless a contrary intent is indicated by the will, the entire interest of such person shall devolve upon the members of the class who survived the testator and the qualified issue of any members of the class who predeceased the testator, taking by substitution as herein provided.

(b) The term "qualified issue" as used in subsection (a) means issue of the deceased person who would have been an heir of the testator under the provisions of the Intestate Succession Act had there been no will.

(c) If subsection (a) is not applicable and if a contrary intent is not indicated by the will:

(1) Where a devise or legacy of any interest in property is void, is revoked, or lapses or which for any other reason fails to take effect, such a devise or legacy shall pass:
  a. Under the residuary clause of the will applicable to real property in case of such devise, or applicable to personal property in case of such legacy, or
  b. As if the testator had died intestate with respect thereto when there is no such applicable residuary clause; and

(2) Where a residuary devise or legacy is void, revoked, lapsed or for any other reason fails to take effect with respect to any devisee or legatee named in the residuary clause itself or a member of a class described therein, then such devise or legacy shall continue as a part of the residue and shall pass to the other residuary devisees or legatees if any; or, if none, shall pass as if the testator had died intestate with respect thereto.

(d) Renunciation of a devise or legacy shall be as provided for in Chapter 31B of the General Statutes. (1844, c. 88, s. 4; R.C., c. 119, s. 7; Code, s. 2142; Rev., s. 3142; 1919, c. 28; C.S., s. 4166; 1951, c. 762, s. 1; 1953, c. 1084; 1965, c. 938, s. 1; 1975, c. 371, s. 3; 1979, c. 525, s. 5; 1987, c. 86, ss. 1, 2; 1989, c. 244.)

Editor's Note. —

Session Laws 1989, c. 244, which added the last sentence of subsection (a), in s. 2 provides that the amendment is applicable to the will of any person dying on or after that date.

Legal Periodicals. —

For article, "Class Gifts in North Carolina — When Do We 'Call The Roll'?," see 21 Wake Forest L. Rev. 1 (1985).

CASE NOTES

I. General Consideration.
II. Property Passing Under Residuary Clause.
III. Devise or Legacy to Testator's Slayer.

I. GENERAL CONSIDERATION.

This section applies to all wills and provides means by which property is to be distributed in the event of failure of devises and legacies by lapse or otherwise. Misenheimer v. Misenheimer, 312 N.C. 692, 325 S.E.2d 195, rehearing denied, 313 N.C. 515, 334 S.E.2d 778 (1985).

Intent to Prevent Lapse. — Should the testator desire to prevent lapse, he must express his intent that the gift not lapse or must provide for substitution of another devisee to receive the gift. In re Hubner, 106 N.C. App. 204, 416 S.E.2d 401, cert. denied, 332 N.C. 148, 419 S.E.2d 572 (1992).

Had testator intended the anti-lapse statute not to apply, he could have very easily shown such contrary intent, and it was not for the court to do that for him. Early v. Bowen, 116 N.C. App. 206, 447 S.E.2d 167 (1994), cert. denied, 339 N.C. 611, 454 S.E.2d 249, — N.C. —, 456 S.E.2d 519 (1995).

Lapse Would Cause Impermissible Rewriting of the Will. — To conclude from the survivor language of testator's will that his intent was to favor the children of the brother who lived longest over the children of the brother who died first was an impermissible rewriting of the will rather than a construction of what was contained within the four corners of the document. Early v. Bowen, 116 N.C. App. 206, 447 S.E.2d 167 (1994), cert. denied, 339 N.C. 611, 454 S.E.2d 249, — N.C. —, 456 S.E.2d 519 (1995).

A renunciation is not a grant of legal title by the renouncer. It merely triggers a set of statutorily defined legal rights which ultimately determine ownership. Hinson v. Hinson, 80 N.C. App. 561, 343 S.E.2d 266 (1986), decided under § 29-10 as it read prior to Oct. 1, 1975.

A renunciation relates back to the death of the testator or intestate. The renouncer never actually holds legal title to the property. Hinson v. Hinson, 80 N.C. App. 561, 343 S.E.2d 266 (1986), decided under § 29-10 as it read prior to Oct. 1, 1975.

A parol trust may not be engrafted upon a renounced interest. Hinson v. Hinson, 80 N.C. App. 561, 343 S.E.2d 266 (1986), decided under § 29-10 as it read prior to Oct. 1, 1975.

Action Seeking Constructive Trust. — Plaintiff, who sought to assert that defendant unduly influenced his decision to sign a "Petition to Renounce" his interest in will, could maintain an action seeking the declaration of a constructive trust. Hinson v. Hinson, 80 N.C. App. 561, 343 S.E.2d 266 (1986), decided under § 29-10 as it read prior to Oct. 1, 1975.

Applied in North Carolina Nat'l Bank v. Apple, 95 N.C. App. 606, 383 S.E.2d 438 (1989).

Stated in Lewis v. Ecklin, 110 N.C. App. 73, 428 S.E.2d 855 (1993).

Cited in McMillan v. Davis, 81 N.C. App. 433, 344 S.E.2d 595 (1986); In re Estate of Baumann, 93 N.C. App. 782, 379 S.E.2d 107 (1989).

II. PROPERTY PASSING UNDER RESIDUARY CLAUSE.

Construction of Residuary Clause, etc. —

No particular mode of expression is needed to constitute a residuary clause. All that is required is an adequate indication that a particular clause was intended to dispose of property which was not otherwise disposed of by the will. Betts v. Parrish, 312 N.C. 47, 320 S.E.2d 662 (1984).

Construction to Prevent Intestacy. —

It is a general rule always to construe a residuary clause so as to prevent an intestacy as regards any part of the testator's estate, unless there is an apparent intention to the contrary. Betts v. Parrish, 312 N.C. 47, 320 S.E.2d 662 (1984).

When the language of the will is definite and clear, the presumption that the will must be construed to prevent partial intestacy is generally not employed. If the language is unambiguous, then there is no need to resort to a construction of the will, and the expression of the testator must be given effect. Betts v. Parrish, 312 N.C. 47, 320 S.E.2d 662 (1984).

Applicability of Subdivision (c)(1)a. — Where it is clear from the residuary clause itself or other parts of the will, that the testator had in fact a contrary intention, namely, that the residue should not be general, and that things given away should not fall into the residue, subdivision (c)(1)a does not apply. Betts v. Parrish, 312 N.C. 47, 320 S.E.2d 662 (1984).

Heirs who partake of a devise pursuant to this section are entitled to a share of a lapsed residuary gift; if the predecessor would have taken a share of a lapsed residuary gift, then the qualified issue may also have participated in this lapsed gift. In re Will of Hubner, 105 N.C. App. 599, 414 S.E.2d 369 (1992).

Devise of Lapsed Residuary Gift. — Heirs who partake of a devise pursuant to the anti-lapse statute are entitled to a share of a lapsed residuary gift. In re

Hubner, 106 N.C. App. 204, 416 S.E.2d 401, cert. denied, 332 N.C. 148, 419 S.E.2d 572 (1992).

Where residuary legatees would have taken a share of a lapsed gift had they survived, their daughters, who were qualified issue, could take the entire share to which residuary legatees would have taken had they survived. In re Hubner, 106 N.C. App. 204, 416 S.E.2d 401, cert. denied, 332 N.C. 148, 419 S.E.2d 572 (1992).

III. DEVISE OR LEGACY TO TESTATOR'S SLAYER.

Subsection (a) Rather Than Subdivision (c)(2) Applies. — If the court were to hold that subdivision (c)(2) of this section applies merely because the slayer does not, in fact, predecease the slain, the court would be ignoring the legislative scheme intended by the statutory presumption of the slayer's death. Moreover, subsection (c) expressly states that that subsection applies only if subsection (a) is not applicable, thus making subsection (a) the dominant or controlling statute. Misenheimer v. Misenheimer, 312 N.C. 692, 325 S.E.2d 195, rehearing denied, 313 N.C. 515, 334 S.E.2d 778 (1985).

Presumption in § 31A-4(3) Equivalent to Actual Death. — It was the intent of the General Assembly that the presumption in § 31A-4(3) be equivalent to actual death for all purposes of determining the disposition of property of the testator. Misenheimer v. Misenheimer, 312 N.C. 692, 325 S.E.2d 195, rehearing denied, 313 N.C. 515, 334 S.E.2d 778 (1985).

Distributed in Accord with Subsection (a). — Because of the failure of a slayer's legacy, the property that would have gone to him under the will had he not been convicted of killing the testator must be distributed in accord with subsection (a). Misenheimer v. Misenheimer, 312 N.C. 692, 325 S.E.2d 195, rehearing denied, 313 N.C. 515, 334 S.E.2d 778 (1985).

Where slayer's two children are alive and would have been heirs of testator had he died intestate, slayer's failed legacy must pass by substitution to them in accordance with subsection (a). Because of the conclusive presumption in § 31A-4(3) that the slayer predeceased the testator, subsection (a), not subdivision (c)(2), applies. Misenheimer v. Misenheimer, 312 N.C. 692, 325 S.E.2d 195, rehearing denied, 313 N.C. 515, 334 S.E.2d 778 (1985).

§ 31-43. General gift by will an execution of power of appointment.

Legal Periodicals. —

For note, "Powers of Appointment—Does a General Residuary Clause Fulfill a Specific Reference Requirement?," see 65 N.C.L. Rev. 1475 (1987).

CASE NOTES

Purpose of Section. —

In accord with the main volume. See First Citizens' Bank & Trust Co. v. Fleming, 77 N.C. App. 568, 335 S.E.2d 515 (1985).

In order to exercise a power of appointment calling for specific reference to the power before the power may be exercised, some reference to the power must be made. First Citizens Bank & Trust Co. v. Fleming, 77 N.C. App. 568, 335 S.E.2d 515 (1985).

Residuary Devise, etc. —

A power of appointment upon which no restrictions are imposed is exercised by a residuary clause. First Citizens Bank & Trust Co. v. Fleming, 77 N.C. App. 568, 335 S.E.2d 515 (1985).

Chapter 31A.

Acts Barring Property Rights.

Article 3.

Willful and Unlawful Killing of Decedent.

Sec.
31A-11. Insurance benefits.

ARTICLE 1.

Rights of Spouse.

§ 31A-1. Acts barring rights of spouse.

CASE NOTES

Legislative Intent. — The apparent purpose of the full statute is to bar the benefits of certain types of property rights and interests otherwise accruing to a person but for his wrongful acts or a divorce or annulment. Taylor v. Taylor, 321 N.C. 244, 362 S.E.2d 542 (1987).

Presumption of Adultery. — Adultery is presumed if the following can be shown: (1) the adulterous disposition, or inclination, of the parties; and (2) the opportunity created to satisfy their mutual adulterous inclinations. In re Trogdon, 330 N.C. 143, 409 S.E.2d 897 (1991).

Wife's Behavior as Inference of Adultery. — A married woman's refusal to testify about the nature of her relationship with two unmarried men, with whom she admitted cohabiting, and her failure to refute the charge of adultery logically gave rise to an inference of adultery. In re Trogdon, 330 N.C. 143, 409 S.E.2d 897 (1991).

Subdivision (b)(6) is inapplicable to separation agreements entered into by parties contemplating a separation or divorce from a valid marriage. Taylor v. Taylor, 321 N.C. 244, 362 S.E.2d 542 (1987).

Proceeding to set aside invalid divorce decree is not barred by death of one of the spouses where property rights are involved. Allred v. Tucci, 85 N.C. App. 138, 354 S.E.2d 291, cert. denied, 320 N.C. 166, 358 S.E.2d 47 (1987).

Cited in In re Estate of Cox, 97 N.C. App. 312, 388 S.E.2d 199 (1990).

ARTICLE 2.

Parents.

§ 31A-2. Acts barring rights of parents.

CASE NOTES

Meaning of Abandonment. — Abandonment is defined as any willful or intentional conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child. Lessard v. Lessard, 77 N.C. App. 97, 334 S.E.2d 475 (1985), aff'd, 316 N.C. 546, 342 S.E.2d 522 (1986).

Abandonment has been defined as willful neglect and refusal to perform the natural and legal obligations of parental care and support; if a parent withholds his presence, his love, his care, and the opportunity to display filial affection, and willfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child. Lessard v. Lessard, 77 N.C. App. 97, 334 S.E.2d 475 (1985), aff'd, 316 N.C. 546, 342 S.E.2d 522 (1986).

Willful intent is an integral part of abandonment and this is a question of fact to be determined from the evidence. Lessard v. Lessard, 77 N.C. App. 97, 334 S.E.2d 475 (1985), aff'd, 316 N.C. 546, 342 S.E.2d 522 (1986).

Or Wrongful Death Proceeds. — In accord with first paragraph in the main volume. See Lessard v. Lessard, 77 N.C. App. 97, 334 S.E.2d 475 (1985), aff'd, 316 N.C. 546, 342 S.E.2d 522 (1986).

ARTICLE 3.

Willful and Unlawful Killing of Decedent.

§ 31A-3. Definitions.

CASE NOTES

This Article, the "slayer statute," applies only to felonious killings; it does not prevent the common law doctrine that no person will be allowed to profit from his own wrong from being applied in actions not under its provisions. In re Estate of Cox, 97 N.C. App. 312, 388 S.E.2d 199 (1990).

Failure to Proceed Within One Year. — Plaintiff's failure to proceed under the slayer statute within one year did not bar him from attempting to show that intestate's culpable negligence proximately contributed to the deaths of the decedents and that her estate could not profit from those wrongs. Lynch v. Newsom, 96 N.C. App. 53, 384 S.E.2d 284, cert. denied, 326 N.C. 48, 389 S.E.2d 90 (1990).

Applied in Jones v. All Am. Life Ins. Co., 312 N.C. 725, 325 S.E.2d 237 (1985).

Cited in Mothershed v. Schrimsher, 105 N.C. App. 209, 412 S.E.2d 123 (1992).

§ 31A-4. Slayer barred from testate or intestate succession and other rights.

CASE NOTES

Presumption in Subdivision (3) Equivalent to Actual Death. — It was the intent of the General Assembly that the presumption in subdivision (3) of this section be equivalent to actual death for all purposes of determining the disposition of property of the testator. Misenheimer v. Misenheimer, 312 N.C. 692, 325 S.E.2d 195, rehearing denied, 313 N.C. 515, 334 S.E.2d 778 (1985).

Slayer's Legacy Distributed in Accord with § 31-42(a). — Because of the failure of a slayer's legacy, the property that would have gone to him under the will had he not been convicted of killing the testator must be distributed in accord with § 31-42(a). Misenheimer v. Misenheimer, 312 N.C. 692, 325 S.E.2d 195, rehearing denied, 313 N.C. 515, 334 S.E.2d 778 (1985).

Order of Death Not Established for Purposes of Distributing Slayer's Estate. — The clause in this section which deems the slayer to have predeceased the victim does not establish the order of death between the slayer and the victim for purposes of distributing the slayer's estate. Mothershed v. Schrimsher, 105 N.C. App. 209, 412 S.E.2d 123 (1992).

Section Does Not Authorize Victim's Participation in Estate. — The plain language of this section clearly bars the slayer from participating in the victim's estate; however, it does not authorize the victim to participate in the slayer's estate; that may or may not occur. Mothershed v. Schrimsher, 105 N.C. App. 209, 412 S.E.2d 123 (1992).

Section Merely Establishes Presumption to Exclude Slayer. — This section does not indulge the fiction that the slayer's date of death is other than the actual date of death, but merely establishes a presumption to exclude the slayer. Mothershed v. Schrimsher, 105 N.C. App. 209, 412 S.E.2d 123 (1992).

Where slayer's two children are

alive and would have been heirs of testator had he died intestate, slayer's failed legacy must pass by substitution to them in accordance with § 31-42(a). Because of the conclusive presumption in subdivision (3) of this section that the slayer predeceased the testator, § 31-42(a), not § 31-42(c)(2), applies. Misenheimer v. Misenheimer, 312 N.C. 692, 325 S.E.2d 195, rehearing denied, 313 N.C. 515, 334 S.E.2d 778 (1985).

Cited in State v. Gilmore, 330 N.C. 167, 409 S.E.2d 888 (1991).

§ 31A-11. Insurance benefits.

(a) Insurance and annuity proceeds payable to the slayer:

(1) As the beneficiary or assignee of any policy or certificate of insurance on the life of the decedent, or

(2) In any other manner payable to the slayer by virtue of his surviving the decedent, shall be paid to the person or persons who would have been entitled thereto as if the slayer had predeceased the decedent. If no alternate beneficiary is named, insurance and annuity proceeds shall be paid into the estate of the decedent.

(b) If the decedent is beneficiary or assignee of any policy or certificate of insurance on the life of the slayer, the proceeds shall be paid to the estate of the decedent upon the death of the slayer, unless the policy names some person other than the slayer or his estate as alternative beneficiary.

(c) Any insurance or annuity company making payment according to the terms of its policy or contract shall not be subjected to additional liability by the terms of this chapter if such payment or performance is made without notice of circumstances tending to bring it within the provisions of this Chapter. (1961, c. 210, s. 1; 1989, c. 485, s. 3.)

Editor's Note. — Session Laws 1989, c. 485, s. 67 is a severability clause.

§ 31A-12. Persons acquiring from slayer protected.

CASE NOTES

Cited in Mothershed v. Schrimsher, 105 N.C. App. 209, 412 S.E.2d 123 (1992).

ARTICLE 4.

General Provisions.

§ 31A-15. Chapter to be broadly construed.

CASE NOTES

Applied in Jones v. All Am. Life Ins. Co., 312 N.C. 725, 325 S.E.2d 237 (1985); In re Trogdon, 330 N.C. 143, 409 S.E.2d 897 (1991).

Cited in In re Trogdon, 101 N.C. App. 323, 399 S.E.2d 396 (1991).

Chapter 32.

Fiduciaries.

Article 3.

Powers of Fiduciaries.

Sec.

32-27. Powers which may be incorporated by reference in trust instrument.

ARTICLE 1.

Uniform Fiduciaries Act.

§ 32-2. Definition of terms.

CASE NOTES

Stated in In re Estate of Armfield, 113 N.C. App. 467, 439 S.E.2d 216 (1994).

ARTICLE 3.

Powers of Fiduciaries.

§ 32-27. Powers which may be incorporated by reference in trust instrument.

The following powers may be incorporated by reference as provided in G.S. 32-26:

(1) Retain Original Property. — To retain for such time as the fiduciary shall deem advisable any property, real or personal, which the fiduciary may receive, even though the retention of such property by reason of its character, amount, proportion to the total estate or otherwise would not be appropriate for the fiduciary apart from this provision.

(2) Sell and Exchange Property. — To sell, exchange, give options upon, partition or otherwise dispose of any property or interest therein which the fiduciary may hold from time to time, with or without order of court, at public or private sale or otherwise, upon such terms and conditions, including credit, and for such consideration as the fiduciary shall deem advisable, and to transfer and convey the property or interest therein which is at the disposal of the fiduciary, in fee simple absolute or otherwise, free of all trust; and the party dealing with the fiduciary shall not be under a duty to follow the proceeds or other consideration received by the fiduciary from such sale or exchange.

(3) Invest and Reinvest. — To invest and reinvest, as the fiduciary shall deem advisable, in stocks (common or preferred), bonds, debentures, notes, mortgages or other secu-

rities, in or outside the United States; in insurance contracts on the life of any beneficiary or of any person in whom a beneficiary has an insurable interest, or in annuity contracts for any beneficiary, in any real or personal property, in investment trusts; in participations in common trust funds, and generally in such property as the fiduciary shall deem advisable, even though such investment shall not be of the character approved by applicable law but for this provision.

(4) Invest without Diversification. — To make investments which cause a greater proportion of the total property held by the fiduciary to be invested in investments of one type or of one company than would be considered appropriate for the fiduciary apart from this provision.

(5) Continue Business. — To the extent and upon such terms and conditions and for such periods of time as the fiduciary shall deem necessary or advisable, to continue or participate in the operation of any business or other enterprise, whatever its form of organization, including but not limited to the power:

a. To effect incorporation, dissolution, or other change in the form of the organization of the business or enterprise;

b. To dispose of any interest therein or acquire the interest of others therein;

c. To contribute thereto or invest therein additional capital or to lend money thereto, in any such case upon such terms and conditions as the fiduciary shall approve from time to time;

d. To determine whether the liabilities incurred in the conduct of the business are to be chargeable solely to the part of the estate or trust set aside for use in the business or to the estate or trust as a whole; and

e. In all cases in which the fiduciary is required to file accounts in any court or in any other public office, it shall not be necessary to itemize receipts and disbursements and distributions of property but it shall be sufficient for the fiduciary to show in the account a single figure or consolidation of figures, and the fiduciary shall be permitted to account for money and property received from the business and any payments made to the business in lump sum without itemization.

(6) Form Corporation or Other Entity. — To form a corporation or other entity and to transfer, assign, and convey to such corporation or entity all or any part of the estate or of any trust property in exchange for the stock, securities or obligations of any such corporation or entity, and to continue to hold such stock and securities and obligations.

(7) Operate Farm. — To continue any farming operation received by the fiduciary pursuant to the will or other instrument and to do any and all things deemed advisable by the fiduciary in the management and maintenance of such farm and the production and marketing of crops and dairy, poultry, livestock, orchard and forest products including but not limited to the following powers:

a. To operate the farm with hired labor, tenants or sharecroppers;

b. To lease or rent the farm for cash or for a share of the crops;

c. To purchase or otherwise acquire farm machinery and equipment and livestock;

d. To construct, repair, and improve farm buildings of all kinds needed in the fiduciary's judgment, for the operation of the farm;

e. To make or obtain loans or advances at the prevailing rate or rates of interest for farm purposes such as for production, harvesting, or marketing, or for the construction, repair, or improvement of farm buildings, or for the purchase of farm machinery or equipment or livestock;

f. To employ approved soil conservation practices in order to conserve, improve, and maintain the fertility and productivity of the soil;

g. To protect, manage and improve the timber and forest on the farm and sell the timber and forest products when it is to the best interest of the estate;

h. To ditch, dam and drain damp or wet fields and areas of the farm when and where needed;

i. To engage in the production of livestock, poultry or dairy products, and to construct such fences and buildings and plant such pastures and crops as may be necessary to carry on such operations;

j. To market the products of the farm; and

k. In general, to employ good husbandry in the farming operation.

(8) Manage Real Property. —

a. To improve, manage, protect, and subdivide any real property;

b. To dedicate or withdraw from dedication parks, streets, highways, or alleys;

c. To terminate any subdivision or part thereof;

d. To borrow money for the purposes authorized by this subdivision for such periods of time and upon such terms and conditions as to rates, maturities and renewals as the fiduciary shall deem advisable and to mortgage or otherwise encumber any such property or part thereof, whether in possession or reversion;

e. To lease any such property or part thereof to commence at the present or in the future, upon such terms and conditions, including options to renew or purchase, and for such period or periods of time as the fiduciary deems advisable although such period or periods may extend beyond the duration of the trust or the administration of the estate involved;

f. To make gravel, sand, oil, gas and other mineral leases, contracts, licenses, conveyances or grants of every nature and kind which are lawful in the jurisdiction in which such property lies;

g. To manage and improve timber and forests on such property, to sell the timber and forest products, and to make grants, leases, and contracts with respect thereto;

h. To modify, renew or extend leases;

i. To employ agents to rent and collect rents;

j. To create easements and release, convey, or assign any right, title, or interest with respect to any easement on such property or part thereof;

k. To erect, repair or renovate any building or other improvement on such property, and to remove or demolish any building or other improvement in whole or in part; and

l. To deal with any such property and every part thereof in all other ways and for such other purposes or considerations as it would be lawful for any person owning the same to deal with such property either in the same or in different ways from those specified elsewhere in this subdivision (8).

(8.1) Comply with environmental law. —

a. To inspect property held by the fiduciary, including interests in sole proprietorships, partnerships, or corporations and any assets owned by any such business enterprise, for the purpose of determining compliance with environmental law affecting such property and to respond to any actual or threatened violation of any environmental law affecting property held by the fiduciary;

b. To take, on behalf of the estate or trust, any action necessary to prevent, abate, or otherwise remedy any actual or threatened violation of any environmental law affecting property held by the fiduciary, either before or after the initiation of an enforcement action by any governmental body;

c. To refuse to accept property in trust if the fiduciary determines that any property to be donated to the trust either is contaminated by any hazardous substance or is being used or has been used for any activity directly or indirectly involving hazardous substance which could result in liability to the trust or otherwise impair the value of the assets held therein;

d. To settle or compromise at any time any and all claims against the trust or estate which may be asserted by any governmental body or private party involving the alleged violation of any environmental law affecting property held in trust or in an estate;

e. To disclaim any power granted by any document, statute, or rule of law which, in the sole discretion of the fiduciary, may cause the fiduciary to incur personal liability under any environmental law;

f. To decline to serve as a fiduciary if the fiduciary reasonably believes that there is or may be a conflict of interest between it in its fiduciary capacity and in its individual capacity because of potential claims or liabilities which may be asserted against it on behalf of the trust or estate because of the type or condition of assets held therein.

g. For purposes of this subsection "environmental law" means any federal, state, or local law, rule, regulation, or ordinance relating to protection of the environment or human health. For purposes of this subsection, "hazardous substances" means any substance defined as hazardous or toxic or otherwise regulated by any environmental law. The fiduciary shall be entitled to charge the cost of any inspection, review, abatement, response, cleanup, or remedial action authorized herein against the income or principal of the trust or estate. A fiduciary shall not be personally liable to any beneficiary or other party for any decrease in value of assets in trust or in an estate by reason of the fiduciary's compliance with any environmental law, specifically including any reporting requirement under such law. Neither the acceptance by the fiduciary of property or a failure by the fiduciary to inspect property shall be deemed to create any inference as to whether or not there is or may be any liability under any environmental law with respect to such property.

(9) Pay Taxes and Expenses. — To pay taxes, assessments, compensation of the fiduciary, and other expenses incurred in the collection, care, administration, and protection of the trust or estate.

(10) Receive Additional Property. — To receive additional property from any source and administer such additional property as a portion of the appropriate trust or estate under the management of the fiduciary; provided the fiduciary shall not be required to receive such property without the fiduciary's consent.

(11) Deal with Other Trusts. — In dealing with one or more fiduciaries:

a. To sell property, real or personal, to, or to exchange property with, the trustee of any trust which the decedent or the settlor or his spouse or any child of his shall have created, for such estates and upon such terms and conditions as to sale price, terms of payment, and security as to the fiduciary shall seem advisable; and the fiduciary shall be under no duty to follow the proceeds of any such sale; and

b. To borrow money for such periods of time and upon such terms and conditions as to rates, maturities, renewals and securities as the fiduciary shall deem advisable from any trust created by the decedent, his spouse, or any child of his, for the purpose of paying debts of the decedent, taxes, the costs of the administration of the estate, and like charges against the estate, or any part thereof, or discharging the liability of any fiduciary thereof and to mortgage, pledge or otherwise encumber such portion of the estate or any trust as may be required to secure such loan or loans and to renew such loans.

(12) Borrow Money. — To borrow money for such periods of time and upon such terms and conditions as to rates, maturities, renewals, and security as the fiduciary shall deem advisable, including the power of a corporate fiduciary to borrow from its own banking department, for the purpose of paying debts, taxes, or other charges against the estate or any trust, or any part thereof, and to mortgage, pledge or otherwise encumber such portion of the estate or

any trust as may be required to secure such loan or loans; and to renew existing loans either as maker or endorser.

(13) Make Advances. — To advance money for the protection of the trust or estate, and for all expenses, losses and liabilities sustained in the administration of the trust or estate or because of the holding or ownership of any trust or estate assets, for which advances with any interest the fiduciary shall have a lien on the assets of the trust or estate as against a beneficiary.

(14) Vote Shares. — To vote shares of stock owned by the estate or any trust at stockholders meetings in person or by special, limited, or general proxy, with or without power of substitution.

(15) Register in Name of Nominee. — To hold a security in the name of a nominee or in other form without disclosure of the fiduciary relationship so that title to the security may pass by delivery, but the fiduciary shall be liable for any act of the nominee in connection with the stock so held.

(16) Exercise Options, Rights, and Privileges. — To exercise all options, rights, and privileges to convert stocks, bonds, debentures, notes, mortgages, or other property into other stocks, bonds, debentures, notes, mortgages, or other property; to subscribe for other or additional stocks, bonds, debentures, notes, mortgages, or other property; and to hold such stocks, bonds, debentures, notes, mortgages, or other property so acquired as investments of the estate or trust so long as the fiduciary shall deem advisable.

(17) Participate in Reorganizations. — To unite with other owners of property similar to any which may be held at any time in the decedent's estate or in any trusts in carrying out any plan· for the consolidation or merger, dissolution or liquidation, foreclosure, lease, or sale of the property, incorporation or reincorporation, reorganization or readjustment of the capital or financial structure of any corporation, company or association the securities of which may form any portion of an estate or trust; to become and serve as a member of a stockholders or bondholders protective committee; to deposit securities in accordance with any plan agreed upon; to pay any assessments, expenses, or sums of money that may be required for the protection or furtherance of the interest of the distributees of an estate or beneficiaries of any trust with reference to any such plan; and to receive as investments of an estate or any trust any securities issued as a result of the execution of such plan.

(18) Reduce Interest Rates. — To reduce the interest rate from time to time on any obligation, whether secured or unsecured, constituting a part of an estate or trust.

(19) Renew and Extend Obligations. — To continue any obligation, whether secured or unsecured, upon and after maturity with or without renewal or extension upon such terms as the fiduciary shall deem advisable, without regard to the value of the security, if any, at the time of such continuance.

(20) Foreclose and Bid in. — To foreclose, as an incident to the collection of any bond, note or other obligation, any mortgage, deed of trust, or other lien securing such bond, note or other obligation, and to bid in the property at such foreclo-

sure sale, or to acquire the property by deed from the mortgagor or obligor without foreclosure; and to retain the property so bid in or taken over without foreclosure.

(21) Insure. — To carry such insurance coverage, including public liability, for such hazards and in such amounts, either in stock companies or in mutual companies, as the fiduciary shall deem advisable.

(22) Collect. — To collect, receive, and receipt for rents, issues, profits, and income of an estate or trust.

(23) Litigate, Compromise or Abandon. — To compromise, adjust, arbitrate, sue on or defend, abandon, or otherwise deal with and settle claims in favor of or against the estate or trust as the fiduciary shall deem advisable, and the fiduciary's decision shall be conclusive between the fiduciary and the beneficiaries of the estate or trust and the person against or for whom the claim is asserted, in the absence of fraud by such persons; and in the absence of fraud, bad faith or gross negligence of the fiduciary, shall be conclusive between the fiduciary and the beneficiaries of the estate or trust.

(24) Employ and Compensate Agents, etc. — To employ and compensate, out of income or principal or both and in such proportion as the fiduciary shall deem advisable, persons deemed by the fiduciary needful to advise or assist in the proper settlement of the estate or administration of any trust, including, but not limited to, agents, accountants, brokers, attorneys-at-law, attorneys-in-fact, investment brokers, rental agents, realtors, appraisers, and tax specialists; and to do so without liability for any neglect, omission, misconduct, or default of such agent or representative provided he was selected and retained with due care on the part of the fiduciary.

(25) Acquire and Hold Property of Two or More Trusts Undivided. — To acquire, receive, hold and retain the principal of several trusts created by a single instrument undivided until division shall become necessary in order to make distributions; to hold, manage, invest, reinvest, and account for the several shares or parts of shares by appropriate entries in the fiduciary's books of account, and to allocate to each share or part of share its proportionate part of all receipts and expenses; provided, however, that the provisions of this subdivision shall not defer the vesting in possession of any share or part of share of the estate or trust.

(25.1) Divide One Trust into Several Trusts and Make Distributions From Those Trusts. — To divide the funds and properties constituting any trusts into two or more identical separate trusts that represent two or more fractional shares of the funds and properties being divided, and to make distributions of income and principal by a method other than pro rata from the separate trusts so created as the fiduciary determines to be in the best interests of the trust beneficiaries. In any case where a single trust has been divided by the fiduciary into two separate trusts, one of which is fully exempt from the federal generation-skipping transfer tax and one of which is fully subject to that tax, the fiduciary may thereafter, to the extent possible consistent with the terms of the governing instrument, determine the value of any mandatory or discretionary distributions to trust beneficiaries on the basis of the combined value of both trusts, but may satisfy such distributions from the separate trusts in a manner designed to minimize the current and potential generation-skipping transfer tax.

(25.2) Consolidate Similar Trusts. — When the trustee is trustee of more than one trust, the terms of which are substantially similar and the beneficiaries of which are identical, to consolidate the assets of those trusts and administer the assets as one trust under the terms of one of the trusts.

(26) Establish and Maintain Reserves. — To set up proper and reasonable reserves for taxes, assessments, insurance premiums, depreciation, obsolescence, amortization, depletion of mineral or timber properties, repairs, improvements, and general maintenance of buildings or other property out of rents, profits, or other income received; and to set up reserves also for the equalization of payments to or for beneficiaries; provided, however, that the provisions of this subdivision shall not affect the ultimate interests of beneficiaries in such reserves.

(27) Distribute in Cash or Kind. — To make distribution of capital assets of the estate or trust in kind or in cash, or partially in kind and partially in cash, in divided or undivided interests, either pro rata or by a method other than pro rata among all distributees, without regard to the income tax basis or other special tax attributes of such assets, as the fiduciary finds to be most practicable and for the best interests of the distributees; and to determine the value of capital assets for the purpose of making distribution thereof if and when there be more than one distributee thereof, which determination shall be binding upon the distributees unless clearly capricious, erroneous and inequitable; provided, however, that the fiduciary shall not exercise any power under this subdivision unless the fiduciary holds title to or an interest in the property to be distributed and is required or authorized to make distribution thereof.

(28) Pay to or for Minors or Incompetents. — To make payments in money, or in property in lieu of money, to or for a minor or incompetent in any one or more of the following ways:

a. Directly to such minor or incompetent;
b. To apply directly in payment for the support, maintenance, education, and medical, surgical, hospital, or other institutional care of such minor or incompetent;
c. To the legal or natural guardian of such minor or incompetent;
d. To any other person, whether or not appointed guardian of the person by any court, who shall, in fact, have the care and custody of the person of such minor or incompetent.

The fiduciary shall not be under any duty to see to the application of the payments so made, if the fiduciary exercised due care in the selection of the person, including the minor or incompetent, to whom such payments were made; and the receipt of such person shall be full acquittance to the fiduciary.

(28.1) Pay to Custodian Under Uniform Gifts or Transfers to Minors Act. — To make any distribution of income or principal, including real property, for the benefit of any distributee to a custodian under the North Carolina Uniform Transfers to Minors Act, Chapter 33A of the General Statutes, or under the provisions of any similar statute in the state where the minor or the custodian resides. Unless a custodian is specifically named in the governing instrument, the fiduciary shall have absolute discretion to nominate any qualified individual or financial institution, including the fiduciary, to serve as custodian, and to nominate one or more substitute custodians.

(29) Apportion and Allocate Receipts and Expenses. — Where not otherwise provided by the Principal and Income Act of 1973, as contained in Chapter 37 of the General Statutes, to determine:

a. What is principal and what is income of any estate or trust and to allocate or apportion receipts and expenses as between principal and income in the exercise of the fiduciary's discretion, and, by way of illustration and not limitation of the fiduciary's discretion, to charge premiums on securities purchased at a premium against principal or income or partly against each;

b. Whether to apply stock dividends and other noncash dividends to income or principal or apportion them as the fiduciary shall deem advisable; and

c. What expenses, costs, taxes (other than estate, inheritance, and succession taxes and other governmental charges) shall be charged against principal or income or apportioned between principal and income and in what proportions.

(30) Make Contracts and Execute Instruments. — To make contracts and to execute instruments, under seal or otherwise, as may be necessary in the exercise of the powers herein granted.

(31) The foregoing powers shall be limited as follows for any trust which shall be classified as a "private foundation" as that term is defined by section 509 of the Internal Revenue Code of 1954 or corresponding provisions of any subsequent federal tax laws (including each nonexempt charitable trust described in section 4947(a)(1) of the code which is treated as a private foundation) or nonexempt split-interest trust described in section 4947(a)(2) of the Internal Revenue Code of 1954 or corresponding provisions of any subsequent federal tax laws (but only to the extent that section 508(e) of the code is applicable to such nonexempt split-interest trust under section 4947(a)(2)):

a. The fiduciary shall make distributions of such amounts, for each taxable year, at such time and in such manner as not to become subject to the tax imposed by section 4942 of the Internal Revenue Code of 1954, or corresponding provisions of any subsequent federal tax laws.

b. No fiduciary shall engage in any act of self-dealing as defined in section 4941(d) of the Internal Revenue Code of 1954, or corresponding provisions of any subsequent federal tax laws.

c. No fiduciary shall retain any excess business holdings as defined in section 4943(c) of the Internal Revenue Code of 1954, or corresponding provisions of any subsequent federal tax laws.

d. No fiduciary shall make any investments in such manner as to subject the trust to tax under section 4944 of the Internal Revenue Code of 1954, or corresponding provisions of any subsequent federal tax laws.

e. No fiduciary shall make any taxable expenditures as defined in section 4945(d) of the Internal Revenue Code of 1954, or corresponding provisions of any subsequent federal tax laws. (1965, c. 628, s. 1; 1967, c. 24, s. 15; c. 956; 1971, c. 1136, s. 3; 1977, c. 30; 1989, c. 652, s. 20; 1991, c. 192, s. 1; 1995, c. 235, ss. 1-3.)

Effect of Amendments. — Session Laws 1995, c. 235, ss. 1, 2 and 3, effective October 1, 1995, in subdivision (27) inserted "either pro rata or by a method other than pro rata among all distributees, without regard to the income tax basis or other special tax attributes of such assets" following "divided or undivided interests"; added subdivision (28.1); and in subdivision (25.1) inserted "and Make Distributions From Those Trusts" to the subdivision catchline, and to the end of the subdivision added the language beginning "and to make distributions of income and principal" to the end.

ARTICLE 5.

Compensation.

§ 32-51. Counsel fees allowable to attorneys serving as fiduciaries.

CASE NOTES

Foreclosure Proceedings. — When a trustee of a deed of trust who is also a licensed attorney performs such extraordinary services as described in this section in connection with a foreclosure proceeding, counsel is entitled under § 45-21.20 to an award of attorney's fees as an "expense[ ] incurred with respect to the sale or proposed sale. . . ." In re Newcomb, 112 N.C. App. 67, 434 S.E.2d 648 (1993).

Chapter 32A.

Editor's Note. — The legislation and annotations affecting Chapter 32A have been included in a recently published replacement chapter.

Chapter 33A.

North Carolina Uniform Transfers to Minors Act.

§ 33A-1. Definitions.

Legal Periodicals. — For note discussing the Uniform Transfers to Minors Act, see 66 N.C.L. Rev. 1349 (1988).

Chapter 34.

Veterans' Guardianship Act.

Sec.
34-2.1. Guardian's powers as to property; validation of prior acts.
34-4. Guardian may not be named for more than five wards; exceptions; banks and trust companies, public guardians, or where wards are members of same family.
34-13. Investment of funds.
34-16. [Repealed.]

§ 34-2.1. Guardian's powers as to property; validation of prior acts.

Any guardian appointed under the provisions of this Chapter may be guardian of all property, real or personal, belonging to the ward to the same extent as a guardian appointed under the provisions of Chapter 35A of the General Statutes, and the provisions of such Chapter concerning the custody, management and disposal of property shall apply in any case not provided for by this Chapter. All acts heretofore performed by guardians appointed under the provisions of this Chapter with respect to the custody, management and disposal of property of wards are hereby validated where no provision for such acts was provided for by this Chapter, if such acts were performed under and in conformity with the provisions of Chapter 35A of the General Statutes. (1955, c. 1272, s. 1; 1987, c. 550, s. 18.)

§ 34-4. Guardian may not be named for more than five wards; exceptions; banks and trust companies, public guardians, or where wards are members of same family.

It shall be unlawful for any person, other than a public guardian qualified under Article 11, Chapter 35A, General Statutes of North Carolina, to accept appointment as guardian of any United States Veterans Administration ward, if such person shall at the time of such appointment be acting as guardian for five wards. For the purpose of this section, all minors of same family unit shall constitute one ward. In all appointments of a public guardian for United States Veterans Administration wards, the guardian shall furnish a separate bond for each appointment as required by G.S. 34-9. If, in any case, an attorney for the United States Veterans Administration presents a petition under this section alleging that an individual guardian other than a public guardian is acting in a fiduciary capacity for more than five wards and requesting discharge of the guardian for that reason, then the court, upon satisfactory evidence that the individual guardian is acting in a fiduciary capacity for more than five wards, must require a final accounting forthwith from such guardian and shall discharge the guardian in such case. Upon the termination of a public guardian's term of office, he may be permitted to retain any appointments made during his term of office.

This section shall not apply to banks and trust companies licensed to do trust business in North Carolina. (1929, c. 33, s. 4; 1967, c. 564, s. 1; 1987, c. 550, s. 19.)

§ 34-13. Investment of funds.

Every guardian shall invest the funds of the estate in any of the following securities:

(1) United States government bonds.

(2) State of North Carolina bonds issued since the year 1872.

(3) By loaning the same upon real estate securities in which the guardian has no interest, such loans not to exceed fifty percent (50%) of the actual appraised or assessed value, whichever may be lower, and said loans when made to be evidenced by a note, or notes, or bond, or bonds, under the seal of the borrower and secured by first mortgage or first deed of trust. Said guardian before making such investment on real estate mortgages shall secure a certificate of title from some reputable attorney certifying that the same is first lien on real estate and also setting forth the tax valuation thereof for the current year: Provided, said guardian may purchase with said funds a home or farm for the sole use of said ward or his dependents upon petition and order of the clerk of superior court, said order to be approved by the resident or presiding judge of the superior court, and provided further that copy of said petition shall be forwarded to said Bureau before consideration thereof by said court. Any guardian may encumber the home or farm so purchased for the entire purchase price or balance thereof to enable the ward to obtain benefits provided in Title 38, U.S. Code, Chapter 37, upon petition to and order of the clerk of superior court of the county of appointment of said guardian and approved by the resident or presiding judge of the superior court. Notice of hearing on such petition, together with copy of the petition, shall be given to the United States Veterans Administration and the Department of Military and Veterans Affairs by mail not less than 15 days prior to the date fixed for the hearing.

(4) Any form of investment allowed by law to the State Treasurer under G.S. 147-69.1.

(5) Repealed by Session Laws 1979, c. 467, s. 22.

It shall be the duty of guardians who shall have funds invested other than as provided for in this section to liquidate same within one year from the passage of this law: Provided, however, that upon the approval of the judge of the superior court, either residing in or presiding over the courts of the district, the clerk of the superior court may authorize the guardian to extend from time to time, the time for sale or collection of any such investments; that no extension shall be made to cover a period of more than one year from the time the extension is made.

The clerk of the superior court of any county in the State or any guardian who shall violate any of the provisions of this section shall be guilty of a Class 1 misdemeanor. (1929, c. 33, s. 13; 1933, c. 262, s. 2; 1957, c. 199; 1959, c. 1015, s. 1; 1967, c. 564, ss. 3, 4; 1973, c. 620, s. 9; 1979, c. 467, s. 22; 1993, c. 539, s. 401; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 1 misdemeanor" for "misdemeanor, punishable by a fine or imprisonment or both in the discretion of the court" at the end of the third paragraph.

§ 34-14.1. Payment of veterans' benefits to relatives.

CASE NOTES

Cited in Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988).

§ 34-16: Repealed by Session Laws 1985, c. 589, s. 14, effective January 1, 1986.

Chapter 35A.

Editor's Note. — The legislation and annotations affecting Chapter 35A have been included in a recently published replacement chapter.

Chapter 36A.

Editor's Note. — The legislation and annotations affecting Chapter 36A have been included in a recently published replacement chapter.

Chapter 36B.

Uniform Management of Institutional Funds Act.

Sec.
36B-1. Definitions.

§ 36B-1. Definitions.

As used in this Chapter, the following terms have the meanings specified:

(1) "Institution" means an incorporated or unincorporated organization organized and operated exclusively for educational, religious, charitable, or other eleemosynary purposes, or a governmental organization to the extent that it holds funds exclusively for any of these purposes;

(2) "Institutional fund" means a fund held by an institution for its exclusive use, benefit, or purposes, but does not include (i) a fund held for an institution by a trustee that is not an institution, unless the fund is held exclusively for the benefit of either a community foundation or community trust, deemed to be "publicly supported" under the Code, as defined in G.S. 105-134.1(*l*), and held by:
a. A bank;
b. A trust company; or
c. Another fiduciary
that is a trustee of the community foundation or community trust or (ii) a fund in which a beneficiary that is not an institution has an interest, other than possible rights that could arise upon violation or failure of the purposes of the fund or (iii) funds other than endowment funds held by a governmental organization;

(3) "Endowment fund" means an institutional fund, or any part thereof, not wholly expendable by the institution on a current basis under the terms of the applicable gift instrument;

(4) "Governing board" means the body responsible for the management of an institution or of an institutional fund;

(5) "Historic dollar value" means the aggregate fair value in dollars of (i) an endowment fund at the time it became an endowment fund, (ii) each subsequent donation to the fund at the time it is made, and (iii) each accumulation made pursuant to a direction in the applicable gift instrument at the time the accumulation is added to the fund. The determination of historic dollar value made in good faith by the institution is conclusive.

(6) "Gift instrument" means a will, deed, trust, grant, conveyance, agreement, memorandum, writing, or other governing document (including the terms of any institutional solicitations from which an institutional fund resulted) under which property is transferred to or held by an institution as an institutional fund. (1985, c. 98, s. 1; 1991, c. 39, s. 1.)

Chapter 37.

Editor's Note. — The legislation and annotations affecting Chapter 37 have been included in a recently published replacement chapter.

Chapter 38.

Boundaries.

§ 38-1. Special proceeding to establish.

CASE NOTES

Only Question Is Location of True Dividing Line. —
Where the only issue to be determined is the location of a dividing line between two parcels of land, the appropriate action is a processioning proceeding as provided by this section; however, in the event title to the land is put in issue, the Clerk may not hear the case, but must transfer it to the Superior Court where it becomes, in effect, an action to quiet title pursuant to § 41-10. Chappell v. Donnelly, 113 N.C. App. 626, 439 S.E.2d 802 (1994).

Putting Title in Issue Converts Proceeding into Quiet Title Action. — Where the only issue to be tried is the location of a dividing line, it is a processioning proceeding under this Chapter. However, where title to the land is put in issue the clerk has no authority to pass on any question involved. He must transfer the proceeding to the regular session of superior court where it becomes in effect an action to quiet title pursuant to § 41-10. Cobb v. Spurlin, 73 N.C. App. 560, 327 S.E.2d 244 (1985).

Questions of Law and Fact as to Lines. — Ordinarily, in a special proceeding brought under this Chapter, "the only question presented is the location of the true dividing line," title or ownership to land not being directly at issue. Particularly, what are petitioners' lines is determinable as a matter of law from the calls in the description of their lands. Where these lines are located on the earth's surface is determinable as a matter of fact. Taylor v. Brittain, 76 N.C. App. 574, 334 S.E.2d 242 (1985), modified and aff'd, 317 N.C. 146, 343 S.E.2d 536 (1986).

Applied in Metcalf v. McGuinn, 73 N.C. App. 604, 327 S.E.2d 51 (1985).

Cited in Fauchette v. Zimmerman, 79 N.C. App. 265, 338 S.E.2d 804 (1986); Nichols v. Wilson, 16 N.C. App. 286, 448 S.E.2d 119, cert. denied, 338 N.C. 519, 452 S.E.2d 814 (1994).

§ 38-3. Procedure.

CASE NOTES

Parties to Proceeding. — All landowners whose land adjoins the disputed boundary and whose interest may be affected are necessary and proper parties. Landowners whose land adjoins boundary lines which are not in dispute, but which may connect with or intersect the disputed line, are not necessary parties, although they may be joined in the discretion of the trial judge. Metcalf v. McGuinn, 73 N.C. App. 604, 327 S.E.2d 51, cert. denied, 314 N.C. 542, 335 S.E.2d 316 (1985).

Failure to Comply with Subsection (c) Not Fatal. — Trial court correctly found that the prior judgment was res judicata as to the location of boundary line despite the fact the court did not issue an order to the surveyor to run and mark the boundary lines; although the trial court may not have totally complied with this section, the court strictly observed the statutory provisions in all material respects. Tindall v. Willis, 95 N.C. App. 374, 382 S.E.2d 778 (1989).

Cited in Green Hi-Win Farm, Inc. v. Neal, 83 N.C. App. 201, 349 S.E.2d 614 (1986).

§ 38-4. Surveys in disputed boundaries.

CASE NOTES

Survey Not Required. — While the better practice is to order a survey in a proceeding to establish a boundary line, this section, the pertinent statute, does not require the court to do so. Young v. Young, 76 N.C. App. 93, 331 S.E.2d 769 (1985).

Applied in Metcalf v. McGuinn, 73 N.C. App. 604, 327 S.E.2d 51, cert. denied, 314 N.C. 542, 335 S.E.2d 316 (1985).

Cited in Higdon v. Davis, 71 N.C. App. 640, 324 S.E.2d 5 (1984).

Chapter 39.

Conveyances.

Article 8.

Business Trusts.

Sec.
39-48, 39-49. [Reserved.]

Article 9.

Disclosure.

Sec.
39-50. Death or illness of previous occupant.

ARTICLE 1.

Construction and Sufficiency.

§ 39-1. Fee presumed, though word "heirs" omitted.

Legal Periodicals. —

For article, "Class Gifts in North Carolina — When Do We 'Call The Roll'?," see 21 Wake Forest L. Rev. 1 (1985).

For article, "Does the Fee Tail Exist in North Carolina?," see 23 Wake Forest L. Rev. 767 (1988).

CASE NOTES

I. General Consideration.
II. Conflicting Clauses.

I. GENERAL CONSIDERATION.

Cited in Atlas Fire Apparatus, Inc. v. Beaver, 56 Bankr. 927 (Bankr. E.D.N.C. 1986); International Paper Co. v. Hufhum, 81 N.C. App. 606, 345 S.E.2d 231 (1986).

II. CONFLICTING CLAUSES.

Conflict Between Granting Clause and Habendum. —

In event of any repugnancy between granting clause and preceding or succeeding recitals, granting clause will prevail. Elliot v. Cox, 100 N.C. App. 536, 397 S.E.2d 319 (1990).

§ 39-1.1. In construing conveyances court shall give effect to intent of the parties.

Legal Periodicals. —

For note as to the transfer of land by wills in light of Stephenson v. Rowe, 315 N.C. 330, 338 S.E.2d 301 (1986), see 65 N.C.L. Rev. 1488 (1987).

CASE NOTES

Legislative Intent. —

When the legislature passed this section, it was their primary intention to abolish past rules of construction which required courts to disregard certain clauses if they contradicted the granting clause of a deed. Instead, for conveyances executed after 1 January 1968, the courts would, under this section, consider equally all clauses in a deed when as the intent of parties. Mason-Reel v. Simpson, 100 N.C. App. 651, 397 S.E.2d 755 (1990).

Construction of Conveyances Exe-

cuted Prior to January 1, 1968. — Deeds executed prior to January 1, 1968, are to be construed according to common law rules, as opposed to the statutory rule of construction found in subsection (a) of this section. Ives v. Real-Venture, Inc., 97 N.C. App. 391, 388 S.E.2d 573, cert. denied, 327 N.C. 139, 394 S.E.2d 174 (1990), reconsideration denied, 328 N.C. 271, 400 S.E.2d 452 (1991).

Deed is to be construed by the court, and meaning of its terms is question of law, not of fact. Elliot v. Cox, 100 N.C. App. 536, 397 S.E.2d 319 (1990).

The meaning of the terms of the deed is a question of law, not of fact. Mason-Reel v. Simpson, 100 N.C. App. 651, 397 S.E.2d 755 (1990).

Intent of Parties to Be Determined by Judge. — In light of the purpose of subsection (a) of this section, the statute's requirement that "the courts" interpret the deed did not change the traditional rule that it is the judge's role to determine the intent of the parties. It was not the legislature's intent to change *who* interprets the intent of the parties in a deed; rather, the statute was an effort by the legislature to state *how* "the courts" should interpret the deed. Therefore, under the statute it is the judge's role to determine the intent of the parties. Mason-Reel v. Simpson, 100 N.C. App. 651, 397 S.E.2d 755 (1990).

Court Has Power to Determine Intent But Not Issues of Fact. — Generally, where there is no waiver of jury trial or agreement as to facts nor evidence offered, the court is without power to decide a controverted issue of fact raised by the pleadings. However, ambiguous deeds traditionally have been construed by the courts according to rules of construction, rather than by having juries determine factual questions of intent. Mason-Reel v. Simpson, 100 N.C. App. 651, 397 S.E.2d 755 (1990).

Ascertaining Intent of Parties. — In some situations it is necessary to look beyond the four corners of the deed to ascertain the intent of the parties. Intention, as a general rule, must be sought in the terms of the instrument; but if the words used leave the intention in doubt, resort may be had to the circumstances attending the execution of the instrument and the situation of the parties at that time; the tendency of the modern decisions is to treat all uncertainties in a conveyance as ambiguities to be explained by ascertaining, in the manner indicated the intention of the parties; where trial judge chose not to hear evidence of "circumstances attending the execution of the instrument and the situation of the parties at that time," and instead, reasoned that he was able to determine the intent of the parties by considering the entire deed, summary judgment was proper. Mason-Reel v. Simpson, 100 N.C. App. 651, 397 S.E.2d 755 (1990).

Deed is to be construed to ascertain intention of grantor as expressed in language used, construed from four corners of instrument. Elliot v. Cox, 100 N.C. App. 536, 397 S.E.2d 319 (1990).

Introductory Recital Repugnant to Granting Clause. — Introductory recital that defendants claimed created tenancy by entirety was repugnant to granting clause and had to be disregarded. Elliot v. Cox, 100 N.C. App. 536, 397 S.E.2d 319 (1990).

Introductory Recital Was Not Given Effect Over Granting Habendum and Warranty Clauses. — Introductory recital, by virtue of being first in deed, not given effect over granting habendum and warranty clauses which were in accord with each other but inconsistent with introductory recital. Elliot v. Cox, 100 N.C. App. 536, 397 S.E.2d 319 (1990).

Jury Trial Held Unnecessary. — Where the cause of action is in fraud, the defendants would have a basic right to a jury trial. However, judge in action to quiet title based on fraud and on construction of deed considered only the intent of the parties in the deed in question and did not reach the issue of fraud. Once the intent was determined from the four corners of the deed, "fraud" no longer mattered and no jury trial was necessary. The judge was able to dispose of the case on a judgment on the pleadings. Mason-Reel v. Simpson, 100 N.C. App. 651, 397 S.E.2d 755 (1990).

§ 39-2. Vagueness of description not to invalidate.

Legal Periodicals. — For note as to the transfer of land by wills in light of Stephenson v. Rowe, 315 N.C. 330, 338 S.E.2d 301 (1986), see 65 N.C.L. Rev. 1488 (1987).

CASE NOTES

Construction so as to Effectuate Intent. — In construing a conveyance of an easement, whether or not executed prior to January 1, 1968, the effective date of this section, the deed is to be construed in such a way as to effectuate the intention of the parties, as gathered from the entire instrument. Higdon v. Davis, 315 N.C. 208, 337 S.E.2d 543 (1985).

Applied in Biggers v. Evangelist, 71 N.C. App. 35, 321 S.E.2d 524 (1984).

§ 39-6.3. Inter vivos and testamentary conveyances of future interests permitted.

Legal Periodicals. —

For article, "Class Gifts in North Carolina — When Do We 'Call The Roll'?," see 21 Wake Forest L. Rev. 1 (1985).

CASE NOTES

Contingent future interests are subject to execution by a judgment creditor of a remainderman. North Carolina Nat'l Bank v. C.P. Robinson Co., 319 N.C. 63, 352 S.E.2d 684 (1987), overruling Watson v. Dodd, 68 N.C. 528 (1873), and Bourne v. Farrar, 180 N.C. 135, 104 S.E. 170 (1920), to the extent that they are inconsistent with this holding.

ARTICLE 2.

Conveyances by Husband and Wife.

§ 39-7. Instruments affecting married person's title; joinder of spouse; exceptions.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Cited in Schiller v. Scott, 82 N.C. App. 90, 345 S.E.2d 444 (1986).

§ 39-13.1. Validation of certain deeds, etc., executed by married women without private examination.

CASE NOTES

What Deeds Are Cured Under Subsection (a). — The plain language of subsection (a) of this section purports to cure deeds which are void because of failure to conduct a private examination of the wife. Subsection (a) does not purport to cure, and does not in fact cure, deeds which are void because the certifying officer taking the acknowledgment of the wife failed to state in his certificate his findings of fact and conclusions that the conveyance is not "unreasonable or injurious to her," as required under former §§ 47-39 and 52-12. West v. Hays, 82 N.C. App. 574, 346 S.E.2d 690 (1986).

This section would not validate a deed which failed to comply with former § 52-12; even if this section would operate to validate the deed for failure of the certifying officer to conduct a private examination, the deed would still be invalid because the certifying officer failed to find whether or not the deed was unreasonable or injurious to the wife. Dunn v. Pate, 98 N.C. App. 351, 390 S.E.2d 712, appeal dismissed and cert. denied, 327 N.C. 427, 395 S.E.2d 676 (1990).

§ 39-13.3. Conveyances between husband and wife.

CASE NOTES

Property Not Removed from Equitable Distribution Act by Dissolution of Tenancy by Entirety. — Though conveyances from wife to husband dissolved the tenancy by the entirety in the parcels of land and vested title thereto solely in husband, as § 39-13.3(c) provides, he nevertheless acquired title to the property thereunder, not by gift, but during the course of the marriage and before the parties separated, and property so acquired, so the General Assembly has declared, is ipso facto marital property. Thus, contrary to husband's contention, dissolving the tenancy by the entirety did not remove the property involved from the ambit of the Equitable Distribution Act, and the trial judge did not err in finding and concluding otherwise. Beroth v. Beroth, 87 N.C. App. 93, 359 S.E.2d 512, cert. denied, 321 N.C. 296, 362 S.E.2d 778 (1987).

§ 39-13.5. Creation of tenancy by entirety in partition of real property.

CASE NOTES

Cited in Lawrence v. Lawrence, 100 N.C. App. 1, 394 S.E.2d 267 (1990).

§ 39-13.6. Control of real property held in tenancy by the entirety.

Legal Periodicals. —

For note, "Branch Banking & Trust Co. v. Wright — Creditors' Rights to Entireties Property Awarded to Nondebtor Spouse Upon Divorce," see 64 N.C.L. Rev. 1471 (1986).

For note on the retroactive application of § 39-13.6 under a vested rights analysis, see 65 N.C.L. Rev. 1195 (1987).

For note, "McLean v. McLean: North Carolina Adopts the Gift Presumption in Equitable Distribution," see 68 N.C. L. Rev. 1269 (1990).

CASE NOTES

This section is reflective of changed circumstances in economic relationship and responsibilities among married persons and expresses a public policy of this State that their rights in property should be equalized. Perry v. Perry, 80 N.C. App. 169, 341 S.E.2d 53 (1986), appeal dismissed, 320 N.C. 170, 357 S.E.2d 925 (1987).

Applicability to tenancies by the entireties which existed prior to January 1, 1983. — Provisions of subsection (a) of this section should generally be construed to apply to tenancies by the entirety which preexisted the effective date of the statute (January 1, 1983) and such application is not, in and of itself, unconstitutional. Perry v. Perry, 80 N.C. App. 169, 341 S.E.2d 53 (1986), appeal dismissed, 320 N.C. 170, 357 S.E.2d 925 (1987).

The General Assembly has clearly manifested its intention that this section, including the "equal right to control" provision of subsection (a), apply to estates by the entirety created before January 1, 1983. Perry v. Perry, 80 N.C. App. 169, 341 S.E.2d 53 (1986), appeal dismissed, 320 N.C. 170, 357 S.E.2d 925 (1987).

The claim of a vested property right may not rest upon state enforcement of common law which is unconstitutionally discriminatory. Thus, to the extent that defendant husband's claims to the exclusive right of control and income of pre-1983 estates by the entirety were based solely upon the common-law incidents of the tenancy, they would fail, as the right recognized by the common law could not be said to be a "vested property right." Perry v. Perry, 80 N.C. App. 169, 341 S.E.2d 53 (1986), appeal dismissed, 320 N.C. 170, 357 S.E.2d 925 (1987).

Burden of Proving Vested Rights. — There may be circumstances under which a husband's rights to income and control of pre-1983 tenancy by the entirety property, to the exclusion of his wife, may be classified as "vested rights" for reasons other than the common-law incidents of that estate. In such cases, the burden will be upon the husband to demonstrate facts showing why his rights are "vested rights" such that application of the "equal control" provisions of subsection (a) of this section to the estate would violate due process. Perry v. Perry, 80 N.C. App. 169, 341 S.E.2d 53 (1986), appeal dismissed, 320 N.C. 170, 357 S.E.2d 925 (1987).

Once the parties were divorced, they no longer held the property as tenants by the entirety but as tenants in common. Smith v. Smith, 249 N.C. 669, 107 S.E.2d 530 (1959); Beam v. Beam, 92 N.C. App. 509, 374 S.E.2d 636 (1988), rev'd on other grounds, 325 N.C. 428, 383 S.E.2d 656 (1989).

Attribution of Income for Child Support Purposes. — Although under the Child Support Guidelines income from rental property is included in the calculation of a parent's gross income, because father and his wife owned property in tenancy by the entirety, he was considered to have received only one-half of the income, or $487.50 per month; it was therefore error for the trial court to attribute the full amount of rental income from the property to father. Kennedy v. Kennedy, 107 N.C. App. 695, 421 S.E.2d 795 (1992).

Cited in Dobbins v. Paul, 71 N.C. App. 113, 321 S.E.2d 537 (1984); Lawrence v. Lawrence, 100 N.C. App. 1, 394 S.E.2d 267 (1990).

ARTICLE 3.

Fraudulent Conveyances.

§ 39-15. Conveyance with intent to defraud creditors void.

CASE NOTES

I. General Consideration.
II. What Conveyances Fraudulent.
  A. In General.
  B. Intent.
III. Rights and Liabilities of Parties and Purchasers.

I. GENERAL CONSIDERATION.

The case of Aman v. Walker, 165 N.C. 224, 81 S.E. 162 (1914), is the cornerstone of the North Carolina fraudulent conveyance law. Chrysler Credit Corp. v. Burton, 599 F. Supp. 1313 (M.D.N.C. 1984).

It Applies Only to Conveyances, etc. —

In accord with the main volume. See Havee v. Belk, 775 F.2d 1209 (4th Cir. 1985).

For discussion of what constitutes valuable consideration under this section, see North Carolina Nat'l Bank v. Evans, 296 N.C. 374, 250 S.E.2d 231 (1979); Smith-Douglass, Div. of Borden Chem., Borden, Inc. v. Kornegay, 70 N.C. App. 264, 318 S.E.2d 895 (1984).

Deed of Gift Insufficient Consideration. — Where plaintiffs received their property by deed of gift, the transfer was for insufficient consideration. Thus, the government need only show that the taxpayers were insolvent in order to void the conveyance, and thereby maintain a lien upon plaintiffs' property. Ross v.

United States, 961 F. Supp. 406 (E.D.N.C. 1994).

Notice of Claim Sufficient. — Where plaintiff alleged and presented evidence of a claim under § 39-17 instead of this section, under the notice pleading requirements of § 1A-1, Rule 8(a), his complaint adequately stated a claim under this section because it gave sufficient notice of the claim to enable the defendants to answer and prepare for trial; the complaint was sufficient to put defendants on notice, and the plaintiff was not held to the more stringent requirements found under § 39-17. Lewis v. Blackman, 116 N.C. App. 414, 448 S.E.2d 133 (1994).

Question for Jury. — Whether a conveyance, whatever its form, was in substance and fact a conveyance by the debtor-bankrupt, or by another such as a pledgee, is a jury question. Havee v. Belk, 775 F.2d 1209 (4th Cir. 1985).

Summary judgment is generally inappropriate in an action for fraud because the existence of fraud necessarily involves a question concerning the existence of fraudulent intent, and the intent of a party is a state of mind generally within the exclusive knowledge of the party and that state of mind must, by necessity, be proved by circumstantial evidence. Lewis v. Blackman, 116 N.C. App. 414, 448 S.E.2d 133 (1994).

Applied in Doby v. Lowder, 72 N.C. App. 22, 324 S.E.2d 26 (1984).

Cited in Moffett v. Daniels, 80 N.C. App. 516, 342 S.E.2d 925 (1986).

II. WHAT CONVEYANCES FRAUDULENT.

A. In General.

Rule Stated. —

In accord with the main volume. See Wilkinson v. United States, 741 F. Supp. 577 (W.D.N.C. 1990).

Conveyance to Wife or to Wife and Self by Entireties. — Complaint brought by individual who succeeded to the rights of existing creditor by virtue of bond and payment thereunder, alleging that while unable to pay a claim that had been pending against him for two years and while he had no other assets with which to pay his creditors, defendant husband gratuitously conveyed his solely owned real property to himself and defendant wife by the entireties and gratuitously had title to other land that he purchased later put in her name stated a claim for relief against defendant wife, as if the alleged circumstances were established the conveyances would be invalid to existing creditors as a matter of law. Nye v. Oates, 96 N.C. App. 343, 385 S.E.2d 529 (1989).

Conveyance Following Separation Agreement. — Despite contention of creditor of husband that separation agreement executed by husband and wife destroyed tenancy by the entirety and vested a property interest in husband against which creditor was entitled to levy, where husband and wife were not divorced until over 8 months following the conveyance of the marital property to husband's parents, the property remained entirety property at the time of the conveyance, and could not be the subject of a conveyance in defraud of husband's individual creditors. The trial court erred in ordering that creditor was entitled to receive the proceeds of the sale of this property. Dealer Supply Co. v. Greene, 108 N.C. App. 31, 422 S.E.2d 350 (1992), cert. denied, 333 N.C. 343, 426 S.E.2d 704 (1993).

B. Intent.

Consideration for the conveyance was another circumstance from which the jury inferred fraudulent intent; although defendants contended that there was valuable consideration in that grantee agreed to assume defendants' indebtedness to a third party in the amount of $93,000 grantee was not making regular payments on the note and the noteholder, who was related to the individual defendants, was allowing grantee to pay off the debt by doing work for him. Dellinger Septic Tank Co. v. Sherrill, 94 N.C. App. 105, 379 S.E.2d 688 (1989).

Evidence of Other Debts Admissible to Show Intent. — Where plaintiff's evidence tended to show that defendants owed debts to plaintiff other than the 1981 judgment and that they had not been able to pay those debts, existence of the other debts was relevant on the issue of defendants' intent. Dellinger Septic Tank Co. v. Sherrill, 94 N.C. App. 105, 379 S.E.2d 688 (1989).

Evidence Held Sufficient to Show Intent. — There was sufficient evidence to support the jury's finding that conveyance was made with the actual intent to defraud plaintiff where plaintiff's evidence showed that defendants owed several debts to plaintiff which they were unable to pay and that plaintiff attempted to collect a $5,000 account balance shortly before the conveyance occurred. Dellinger Septic Tank Co. v. Sherrill, 94 N.C. App. 105, 379 S.E.2d 688 (1989).

III. RIGHTS AND LIABILITIES OF PARTIES AND PURCHASERS.

Grantee Must Be Purchaser for Value to Be Protected. — North Carolina law protects bona fide purchasers from creditors of the grantor. In order to be protected a grantee must first be a purchaser for value. Chrysler Credit Corp. v. Burton, 599 F. Supp. 1313 (M.D.N.C. 1984).

Deed of trust to secure a present loan constitutes the beneficiary a purchaser for value. Chrysler Credit Corp. v. Burton, 599 F. Supp. 1313 (M.D.N.C. 1984).

§ 39-17. Voluntary conveyance evidence of fraud as to existing creditors.

CASE NOTES

I. General Consideration.
II. Pleading and Practice.

I. GENERAL CONSIDERATION.

When Conveyance May Be Set Aside as Fraudulent. — Before a conveyance may be set aside as fraudulent, the finder of fact must find that the conveyance was voluntary, that the conveyance was made without fair and reasonable consideration and that the conveyance was either made with the intent to defraud creditors or made so that at the time of the conveyance the transferor did not retain sufficient property to satisfy his then existing debts. Valdese Gen. Hosp. v. Burns, 79 N.C. App. 163, 339 S.E.2d 23 (1986).

Corporation Sold Subject to Its Corporate Debt. — A corporation holds its property subject to the payment of the corporate debts, and when a corporation sells or transfers its entire property to a purchaser, knowing the fact, the latter is chargeable with knowledge that the property is subject to the corporate debts and that equity will, in proper cases, allow the corporate creditors to follow the property into the hands of the purchaser, for satisfaction of their claims. Budd Tire Corp. v. Pierce Tire Co., 90 N.C. App. 684, 370 S.E.2d 267 (1988).

When a corporation purchases all or substantially all of the assets of another corporation for grossly inadequate consideration, the transfer will be deemed fraudulent as to the selling corporation's creditors, regardless of whether the parties had the actual intent to defraud. Budd Tire Corp. v. Pierce Tire Co., 90 N.C. App. 684, 370 S.E.2d 267 (1988).

Good will is an asset capable of being fraudulently conveyed, and where the good will is put beyond reach of creditors, equity will allow a money damage award equal to the value of the good will. Budd Tire Corp. v. Pierce Tire Co., 90 N.C. App. 684, 370 S.E.2d 267 (1988).

Where one corporation purchases all or substantially all of the assets of another corporation, including the good will, in a manner deemed fraudulent, the selling corporation's creditors may follow the good will into the hands of the purchasing corporation and obtain a money damage award equal to its value. Budd Tire Corp. v. Pierce Tire Co., 90 N.C. App. 684, 370 S.E.2d 267 (1988).

Applied in Smith-Douglass, Div. of Borden Chem., Borden, Inc. v. Kornegay, 70 N.C. App. 264, 318 S.E.2d 895 (1984); Havee v. Belk, 589 F. Supp. 600 (W.D.N.C. 1984).

Cited in Chrysler Credit Corp. v. Burton, 599 F. Supp. 1313 (M.D.N.C. 1984).

II. PLEADING AND PRACTICE.

Pleading and Evidence Sufficient to State a Claim Under § 39-15. — Where plaintiff alleged and presented evidence of a claim under this section instead of § 39-15, under the notice pleading requirements of § 1A-1, Rule 8(a), his complaint adequately stated a claim under § 39-15 because it gave sufficient notice of the claim to enable the defendants to answer and prepare for trial; the complaint was sufficient to put defendants on notice, and the plaintiff was not held to the more stringent requirements found in this section. Lewis

v. Blackman, 116 N.C. App. 414, 448 S.E.2d 133 (1994).

Evidence of Other Debts Admissible to Show Intent. — Where plaintiff's evidence tended to show that defendants owed debts to plaintiff other than the 1981 judgment and that they had not been able to pay those debts, existence of the other debts was relevant on the issue of defendants' intent. Dellinger Septic Tank Co. v. Sherrill, 94 N.C. App. 105, 379 S.E.2d 688 (1989).

§ 39-18. Marriage settlements void as to existing creditors.

Legal Periodicals. —

For note, "Branch Banking & Trust Co. v. Wright — Creditors' Rights to Entireties Property Awarded to Nondebtor Spouse Upon Divorce," see 64 N.C.L. Rev. 1471 (1986).

CASE NOTES

Cited in Chrysler Credit Corp. v. Burton, 599 F. Supp. 1313 (M.D.N.C. 1984).

ARTICLE 4.

Voluntary Organizations and Associations.

§ 39-24. Authority to acquire and hold real estate.

CASE NOTES

Controlling Effect of § 1-69.1. — This section was enacted in 1939. The amendment to § 1-69.1, which added the requirement of an allegation of § 66-68 recordation before suit may be brought by an unincorporated association in its common name, was enacted effective 1 October 1975. In the face of any irreconcilable conflict between the provisions of these two statutes, § 1-69.1, being the later enactment, will control or be regarded as a qualification of the earlier statute. Cherokee Home Demonstration Club v. Oxendine, 100 N.C. App. 622, 397 S.E.2d 643 (1990).

Requirements of § 1-69.1 are mandatory and failure to satisfy them is not exonerated by this section. Cherokee Home Demonstration Club v. Oxendine, 100 N.C. App. 622, 397 S.E.2d 643 (1990).

§ 39-25. Title vested; conveyance; probate.

CASE NOTES

Unincorporated, Unregistered Association May Hold Property in Its Common Name. — Under the wording of this section, unincorporated, unregistered association may hold real property in its common name; however, if the association wishes to bring suit concerning this property, it must be registered in accordance with § 66-68. Cherokee Home Demonstration Club v. Oxendine, 100 N.C. App. 622, 397 S.E.2d 643 (1990).

Requirement That Unincorporated Association Allege Registration. — While it is true that § 1-69.1 requires unincorporated association to allege its registration for purposes of bringing suit in its collective name, there is no concomitant requirement attached to its right to hold property under this section. Cherokee Home Demonstration Club v. Oxendine, 100 N.C. App. 622, 397 S.E.2d 643 (1990).

Article 7.

Uniform Vendor and Purchaser Risk Act.

§ 39-36. Necessity for actual notice of release or limitation to bind fiduciary.

CASE NOTES

Cited in Sprouse v. North River Ins. Co., 81 N.C. App. 311, 344 S.E.2d 555, cert. denied, 318 N.C. 284, 348 S.E.2d 344 (1986).

§ 39-37. Short title.

Legal Periodicals. — For comment, "Offer to Purchase and Contract: Buyer Beware," see 8 Campbell L. Rev. 473 (1986).

§ 39-38. Uniformity of interpretation.

Legal Periodicals. — For comment, "Offer to Purchase and Contract: Buyer Beware," see 8 Campbell L. Rev. 473 (1986).

CASE NOTES

Cited in Sprouse v. North River Ins. Co., 81 N.C. App. 311, 344 S.E.2d 555, cert. denied, 318 N.C. 284, 348 S.E.2d 344 (1986).

§ 39-39. Risk of loss.

Legal Periodicals. — For comment, "Offer to Purchase and Contract: Buyer Beware," see 8 Campbell L. Rev. 473 (1986).

CASE NOTES

Risk of Loss Not Shifted to High Bidder Prior to Closing. — Under this Act the making of the high bid in a foreclosure sale does not operate to extinguish the seller's interests and shift all risks to the purchaser. Sprouse v. North River Ins. Co., 81 N.C. App. 311, 344 S.E.2d 555, cert. denied, 318 N.C. 284, 348 S.E.2d 344 (1986).

Nothing in this section shifts the risk of loss prior to closing to the high bidder. In fact, the high bidder cannot compel relinquishment of the premises until the price has been paid in full, and the mortgagor remains subject to personal liability on the note until then. Sprouse v. North River Ins. Co., 81 N.C. App. 311, 344 S.E.2d 555, cert. denied, 318 N.C. 284, 348 S.E.2d 344 (1986).

ARTICLE 8.

Business Trusts.

§§ 39-48, 39-49: Reserved for future codification purposes.

ARTICLE 9.

Disclosure.

§ 39-50. Death or illness of previous occupant.

In offering real property for sale it shall not be deemed a material fact that the real property was occupied previously by a person who died or had a serious illness while occupying the property; provided, however, that no seller may knowingly make a false statement regarding such past occupancy. (1989, c. 592, s. 1.)

Editor's Note. — Session Laws 1989, c. 592, s. 3 made this Article effective July 1, 1989, and applicable to acts or omissions occurring on or after July 1, 1989.

Chapter 40A.

Eminent Domain.

Article 1.

General.

Sec.
40A-3. By whom right may be exercised.

Article 3.

Condemnation by Public Condemnors.

40A-42. Vesting of title and right of possession; injunction not precluded.

Article 5.

Return of Condemned Property.

40A-70. Return of condemned property.

ARTICLE 1.

General.

§ 40A-1. Exclusive provisions.

Local Modification. — City of Conover: 1985, c. 422; city of Hickory: 1985, c. 422; city of Rocky Mount: 1989, c. 328, s. 1; city of Wilson: 1989, c. 348, s. 1; city of Winston-Salem: 1985, c. 47; 1987, c. 95; town of Apex: 1987, c. 70; town of Maiden: 1985, c. 422. For additional local modifications to this section, see the main pamphlet.

Legal Periodicals. —

For article, "Out of Focus: The Fuzzy Line Between Regulatory 'Takings' and Valid Zoning-Related 'Exactions' in North Carolina and Federal Jurisprudence," see 16 Campbell L. Rev. 333 (1994).

CASE NOTES

Chapter Is Applicable to Private Landowners. — Even though private landowners are not specifically mentioned in § 40A-3, they are bound by the provisions of this Chapter. Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

Applicability of Rules of Civil Procedure to Private Condemnation Proceedings. — Section 40A-12, together with § 1-393, gives trial courts clear authority to apply the Rules of Civil Procedure in private condemnation proceedings, at least to the extent that those rules do not directly conflict with procedures specifically mandated by this Chapter. VEPCO v. Tillett, 316 N.C. 73, 340 S.E.2d 62 (1986).

Conversion of Private Condemnation Proceedings into Quiet Title Action. — Trial court did not err by applying § 1A-1, Rule 15(b) in such a way as to convert condemnation proceedings brought by private condemnors, with the consent of the parties, into an action to quiet title. VEPCO v. Tillett, 316 N.C. 73, 340 S.E.2d 62 (1986).

Municipal Annexation Proceedings Enjoined by Condemnor-County. — When a county initiates condemnation of property for a sanitary landfill, and the property is being considered for voluntary annexation into a municipality, the county may proceed with the condemnation action. The county is entitled to an injunction enjoining the annexation proceeding, and the property owners and the municipality may raise the proposed annexation in the answer to the condemnation complaint, for appropriate consideration by the court. Yandle v. Mecklenburg County, 85 N.C. App. 382, 355 S.E.2d 216, cert. denied, 320 N.C. 798, 361 S.E.2d 91 (1987).

Applied in Bandy v. City of Charlotte, 72 N.C. App. 604, 325 S.E.2d 17 (1985).

Cited in Davidson County v. City of High Point, 85 N.C. App. 26, 354 S.E.2d

280 (1987); Town of Emerald Isle ex rel. Smith v. State, 320 N.C. 640, 360 S.E.2d 756 (1987); Dare County Bd. of Educ. v. Sakaria, 118 N.C. App. 609, 456 S.E.2d 842 (1995).

§ 40A-2. Definitions.

CASE NOTES

Definition of "property" is broad enough to include profits à prendre, requiring just compensation to the owner of that interest when the right to enter upon lands is lost through condemnation. In re Lee, 85 N.C. App. 302, 354 S.E.2d 759, cert. denied, 320 N.C. 513, 358 S.E.2d 520 (1987).

The term "other persons" as used in the cartway statute, does include counties. Davis v. Forsyth County, 117 N.C. App. 725, 453 S.E.2d 231 (1995).

Cited in VEPCO v. Tillett, 316 N.C. App. 73, 343 S.E.2d 188 (1986).

§ 40A-3. By whom right may be exercised.

(a) Private Condemnors. — For the public use or benefit, the persons or organizations listed below shall have the power of eminent domain and may acquire by purchase or condemnation property for the stated purposes and other works which are authorized by law.

(1) Corporations, bodies politic or persons have the power of eminent domain for the construction of railroads, power generating facilities, substations, switching stations, microwave towers, roads, alleys, access railroads, turnpikes, street railroads, plank roads, tramroads, canals, telegraphs, telephones, electric power lines, electric lights, public water supplies, public sewerage systems, flumes, bridges, and pipelines or mains originating in North Carolina for the transportation of petroleum products, coal, gas, limestone or minerals. Land condemned for any liquid pipelines shall:

a. Not be less than 50 feet nor more than 100 feet in width; and

b. Comply with the provisions of G.S. 62-190(b).

The width of land condemned for any natural gas pipelines shall not be more than 100 feet.

(2) School committees or boards of trustees or of directors of any corporation holding title to real estate upon which any private educational institution is situated, have the power of eminent domain in order to obtain a pure and adequate water supply for such institution.

(3) Franchised motor vehicle carriers or union bus station companies organized by authority of the Utilities Commission, have the power of eminent domain for the purpose of constructing and operating union bus stations: Provided, that this subdivision shall not apply to any city or town having a population of less than 60,000.

(4) Any railroad company has the power of eminent domain for the purposes of: constructing union depots; maintaining, operating, improving or straightening lines or of altering its location; constructing double tracks; constructing and maintaining new yards and terminal facilities or enlarging its yard or terminal facilities; connecting two of its lines

already in operation not more than six miles apart; or constructing an industrial siding ordered by the Utilities Commission as provided in G.S. 62-232.

The width of land condemned for any single or double track railroad purpose shall be not less than 80 feet nor more than 100 feet, except where the road may run through a town, where it may be of less width, or where there may be deep cuts or high embankments, where it may be of greater width.

No rights granted or acquired under this subsection shall in any way destroy or abridge the rights of the State to regulate or control any railroad company or to regulate foreign corporations doing business in this State. Whenever it is necessary for any railroad company doing business in this State to cross the street or streets in a town or city in order to carry out the orders of the Utilities Commission, to construct an industrial siding, the power is hereby conferred upon such railroad company to occupy such street or streets of any such town or city within the State. Provided, license so to do be first obtained from the board of aldermen, board of commissioners, or other governing authorities of such town or city.

No such condemnor shall be allowed to have condemned to its use, without the consent of the owner, his burial ground, usual dwelling house and yard, kitchen and garden, unless condemnation of such property is expressly authorized by statute.

The power of eminent domain shall be exercised by private condemnors under the procedures of Article 2 of this Chapter.

(b) Local Public Condemnors. — For the public use or benefit, the governing body of each municipality or county shall possess the power of eminent domain and may acquire by purchase, gift or condemnation any property, either inside or outside its boundaries, for the following purposes.

(1) Opening, widening, extending, or improving roads, streets, alleys, and sidewalks. The authority contained in this subsection is in addition to the authority to acquire rights-of-way for streets, sidewalks and highways under Article 9 of Chapter 136. The provisions of this subdivision (1) shall not apply to counties.

(2) Establishing, extending, enlarging, or improving any of the public enterprises listed in G.S. 160A-311 for cities, or G.S. 153A-274 for counties.

(3) Establishing, enlarging, or improving parks, playgrounds, and other recreational facilities.

(4) Establishing, extending, enlarging, or improving storm sewer and drainage systems and works, or sewer and septic tank lines and systems.

(5) Establishing, enlarging, or improving hospital facilities, cemeteries, or library facilities.

(6) Constructing, enlarging, or improving city halls, fire stations, office buildings, courthouse jails and other buildings for use by any department, board, commission or agency.

(7) Establishing drainage programs and programs to prevent obstructions to the natural flow of streams, creeks and natural water channels or improving drainage facilities. The authority contained in this subdivision is in addition to any authority contained in Chapter 156.

(8) Acquiring designated historic properties, designated as such before October 1, 1989, or acquiring a designated

landmark designated as such on or after October 1, 1989, for which an application has been made for a certificate of appropriateness for demolition, in pursuance of the purposes of G.S. 160A-399.3, Chapter 160A, Article 19, Part 3B, effective until October 1, 1989, or G.S. 160A-400.14, whichever is appropriate.

(9) Opening, widening, extending, or improving public wharves.

The board of education of any municipality or county or a combined board may exercise the power of eminent domain under this Chapter for purposes authorized by other statutes.

The power of eminent domain shall be exercised by local public condemnors under the procedures of Article 3 of this Chapter.

(c) Other Public Condemnors. — For the public use or benefit, the following political entities shall possess the power of eminent domain and may acquire property by purchase, gift, or condemnation for the stated purposes.

(1) A sanitary district board established under the provisions of Part 2 of Article 2 of Chapter 130A for the purposes stated in that Part.

(2) The board of commissioners of a mosquito control district established under the provisions of Part 2 of Article 12 of Chapter 130A for the purposes stated in that Part.

(3) A hospital authority established under the provisions of Part B of Article 2 of Chapter 131E for the purposes stated in that Part, provided, however, that the provisions of G.S. 131E-24(c) shall continue to apply.

(4) A watershed improvement district established under the provisions of Article 2 of Chapter 139 for the purposes stated in that Article, provided, however, that the provisions of G.S. 139-38 shall continue to apply.

(5) A housing authority established under the provisions of Article 1 of Chapter 157 for the purposes of that Article, provided, however, that the provisions of G.S. 157-11 shall continue to apply.

(6) A corporation as defined in G.S. 157-50 for the purposes of Article 3 of Chapter 157, provided, however, the provisions of G.S. 157-50 shall continue to apply.

(7) A commission established under the provisions of Article 22 of Chapter 160A for the purposes of that Article.

(8) An authority created under the provisions of Article 1 of Chapter 162A for the purposes of that Article, provided, however, the provisions of G.S. 162A-7 shall continue to apply.

(9) A district established under the provisions of Article 4 of Chapter 162A for the purposes of that Article.

(10) A district established under the provisions of Article 5 of Chapter 162A for purposes of that Article.

(11) The board of trustees of a community college established under the provisions of Article 2 of Chapter 115D for the purposes of that Article.

(12) A district established under the provisions of Article 6 of Chapter 162A for the purposes of that Article.

(13) A regional transportation authority established under Article 26 of Chapter 160A of the General Statutes for the purposes of that Article.

The power of eminent domain shall be exercised by a public condemnor listed in this subsection under the procedures of Article 3 of this Chapter. (1852, c. 92, s. 1; R.C., c. 61, s. 9; 1874-5, c. 83; Code, s. 1698; Rev., s. 2575; 1907, cc. 39, 458, 783; 1911, c. 62, ss. 25, 26, 27; 1917, cc. 51, 132; C.S., s. 1706; 1923, c. 205; Ex. Sess. 1924, c. 118; 1937, c. 108, s. 1; 1939, c. 228, s. 4; 1941, c. 254; 1947, c. 806; 1951, c. 1002, ss. 1, 2; 1953, c. 1211; 1957, c. 65, s. 11; c. 1045, s. 1; 1961, c. 247; 1973, c. 507, s. 5; c. 1262, s. 86; 1977, c. 771, s. 4; 1981, c. 919, s. 1; 1983, c. 378, s. 2; 1983 (Reg. Sess., 1984), c. 1084; 1985, c. 689, s. 10; c. 696, s. 2; 1987, c. 2, s. 1; c. 564, s. 13; c. 783, s. 6; 1989, c. 706, s. 3; c. 740, s. 1.1.)

Local Modification. — Guilford: 1987, c. 669, s. 3; Iredell: 1985, c. 570, s. 25; Stanly: 1985, c. 433, s. 2; 1989 (Reg. Sess., 1990), c. 839; Wake: 1985, c. 640, s. 1; 1993, c. 137, s. 2; Winston-Salem/Forsyth County Utility Commission: 1989 (Reg. Sess., 1990), c. 849; city of Asheville: 1985, c. 556, s. 2; cities of Greensboro and High Point: 1987, c. 669, s. 3; city of Morganton: 1987, c. 265, s. 1; city of Monroe: 1985, c. 177; city of Raleigh: 1985, c. 556, s. 2; city of Statesville: 1985, c. 570, s. 25; 1987, c. 265, s. 1; town of Carrboro: 1987, c. 476, s. 1; town of Cary: 1993, c. 137, s. 2; town of Wrightsville Beach: 1993, c. 187, s. 1; Grandfather Village: 1987, c. 419, s. 1; village of Pinehurst: 1985, c. 379, s. 2.

Cross References. — As to requirement for consent of board of commissioners in certain counties before land may be condemned or acquired by a unit of local government outside the county, see § 153A-15.

CASE NOTES

I. General Consideration.
II. Public Use.
III. Private Condemnors.
  A. In General.
IV. Public Condemnors.
VI. Judicial Review.

I. GENERAL CONSIDERATION.

Chapter Is Applicable to Private Landowners. — Even though private landowners are not specifically mentioned in this section, they are bound by the provisions of this Chapter. Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

Subdivision ordinance as applied by defendant constituted an exaction requiring the court to determine whether the exaction amounted to an unconstitutional taking; therefore, summary judgment for defendant was inappropriate as to that issue. Franklin Rd. Properties v. City of Raleigh, 94 N.C. App. 731, 381 S.E.2d 487 (1989).

Applied in City of Burlington v. Isley Place Condominium Ass'n, 105 N.C. App. 713, 414 S.E.2d 385 (1992).

Cited in Batch v. Town of Chapel Hill, 92 N.C. App. 601, 376 S.E.2d 22 (1989); Pinehurst v. Regional Invs., 97 N.C. App. 114, 387 S.E.2d 222 (1990).

II. PUBLIC USE.

Meaning of "Public Use". — The statutory phrase "the public use or benefit" is incapable of a precise definition applicable to all situations. Rather, because of the progressive demands of an ever-changing society and the perpetually fluid concept of governmental duty and function, the phrase is elastic and keeps pace with the changing times. Carolina Tel. & Tel. Co. v. McLeod, 321 N.C. 426, 364 S.E.2d 399 (1988).

Test of Public Use or Benefit. — On judicial determination of whether a condemnor's intended use is an action for "the public use or benefit" under this section, courts in this and other states have employed essentially two approaches to this problem. The first approach — the public use test — asks whether the public has a right to a definite use of the condemned property. The second approach — the public benefit test — asks whether some benefit accrues to the public as a result of the desired condemnation. Carolina Tel. & Tel. Co. v. McLeod, 321 N.C. 426, 364 S.E.2d 399 (1988).

Question of Law. — While the delegation of the power of eminent domain is for the legislature, the determination of whether a condemnor's intended use of the land is for "the public use or benefit" is a question of law for the courts. Carolina Tel. & Tel. Co. v. McLeod, 321 N.C. 426, 364 S.E.2d 399 (1988).

A taking can be for public use or benefit even when there is also a substantial private use, so long as the private use in question is incidental to the paramount public use. Carolina Tel. & Tel. Co. v. McLeod, 321 N.C. 426, 364 S.E.2d 399 (1988).

The provision of telephone service, irrespective of the number of customers affected, is an action for "the public use or benefit." Carolina Tel. & Tel. Co. v. McLeod, 321 N.C. 426, 364 S.E.2d 399 (1988).

III. PRIVATE CONDEMNORS.

A. In General.

Installation of water and sewer lines solely for the benefit of one individual's manufacturing plant involved a private use, despite petitioner's argument that the plant would benefit the public by employing 30 people and thus contribute to the public welfare; and dismissal of petitioner's condemnation proceeding would be affirmed. City of Statesville v. Roth, 77 N.C. App. 803, 336 S.E.2d 142 (1985).

IV. PUBLIC CONDEMNORS.

Public Recreational Facility Need Not Be Designed Before Land Is Acquired. — Neither subdivision (b)(3) of this section, which vests municipalities with the power of eminent domain to establish, enlarge or improve parks, playgrounds and other recreational facilities, nor § 160A-353, of similar import, nor any other statute contains any requirement that the city design a public facility authorized by resolution before the land for the facility is acquired. City of Charlotte v. Rousso, 82 N.C. App. 588, 346 S.E.2d 693 (1986).

Local Zoning Laws. — While municipalities or counties may exercise the power of eminent domain for the construction, enlarging or improving of those buildings listed in subdivision (b)(6), the power of eminent domain does not include locating a particular building in violation of another jurisdiction's zoning laws, by virtue of the fact that through §§ 153A-347 and 160A-392 the Legislature has made zoning regulations with regard to buildings specifically applicable to political subdivisions. The same zoning restrictions do not apply, however, to the construction, establishment, enlargement, improvement, maintenance, ownership or operation of a public enterprise unless the Legislature has clearly manifested a contrary intent. Davidson County v. City of High Point, 85 N.C. App. 26, 354 S.E.2d 280, modified and aff'd, 321 N.C. 252, 362 S.E.2d 553 (1987).

Municipal Airports. — The provisions of this Chapter now control cities' eminent domain actions with respect to airports. Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

It was not error to find that plaintiff was authorized to acquire land for parks, recreational programs and facilities through exercise of power of eminent domain. Town of Chapel Hill v. Burchette, 100 N.C. App. 157, 394 S.E.2d 698 (1990).

VI. JUDICIAL REVIEW.

To determine whether an exaction amounts to an unconstitutional taking, the court shall: (1) identify the condition imposed; (2) identify the regulation which caused the condition to be imposed; (3) determine whether the regulation substantially advances a legitimate state interest. If the regulation substantially advances a legitimate state interest, the court shall then determine (4) whether the condition imposed advances that interest; and (5) whether the condition imposed is proportionally related to the impact of the development. Franklin Rd. Properties v. City of Raleigh, 94 N.C. App. 731, 381 S.E.2d 487 (1989), citing Batch v. Town of Chapel Hill, 92 N.C. App. 601, 376 S.E.2d 22 (1989), rev'd on other grounds, 326 N.C. 1, 387 S.E.2d 655, cert. denied, 496 U.S. 931, 110 S. Ct. 2631, 110 L. Ed. 2d 651 (1990).

§ 40A-5. Condemnation of property owned by other condemnors.

Local Modification. — Cabarrus: 1991 (Reg. Sess., 1992), c. 937, s. 1; 1993 (Reg. Sess., 1994), c. 700, s. 1.

§ 40A-8. Costs.

CASE NOTES

Award of Attorneys' Fees in Inverse Condemnation Proceeding. — It is consistent with this section to award attorneys' fees when a landowner's counterclaim is the impetus behind the condemnor's concession that it took land not described in the complaint and declaration of taking, and when a verdict demonstrates that the jury awarded compensation for that taking. City of Raleigh v. Hollingsworth, 96 N.C. App. 260, 385 S.E.2d 513 (1989), cert. denied, 326 N.C. 363, 389 S.E.2d 816 (1990).

Plaintiff Could Not Proceed in One Action with Petition for Certiorari and Complaint for Costs, Damages, etc. — Plaintiff's petition for writ of certiorari to review town's decision denying plaintiff's subdivision permit application was improperly joined with her complaint against the town in which she alleged constitutional violations and sought damages, costs, and attorneys' fees pursuant to this section. Batch v. Town of Chapel Hill, 326 N.C. 1, 387 S.E.2d 655, cert. denied, 496 U.S. 931, 110 S. Ct. 2631, 110 L. Ed. 2d 651 (1990).

Assessment of Costs Upheld. — Where although city filed a Declaration of Taking, it did not include property held to have been inversely condemned, the court's assessment of costs under this section was proper. City of Winston-Salem v. Ferrell, 79 N.C. App. 103, 338 S.E.2d 794 (1986).

Cited in Yates v. Jamison, 782 F.2d 1182 (4th Cir. 1986); Finch v. City of Durham, 325 N.C. 352, 384 S.E.2d 8 (1989).

§ 40A-10. Sale or other disposition of land condemned.

Local Modification. — Cabarrus: 1991, c. 685, s. 8; Cabarrus County and any incorporated municipality partly or wholly in Cabarrus County: 1985, c. 269.

§ 40A-12. Additional rules.

CASE NOTES

Applicability of Rules of Civil Procedure to Private Condemnation Proceedings. — This section, together with § 1-393, gives trial courts clear authority to apply the Rules of Civil Procedure, § 1A-1, in private condemnation proceedings, at least to the extent that those rules do not directly conflict with procedures specifically mandated by this Chapter. VEPCO v. Tillett, 316 N.C. 73, 340 S.E.2d 62, cert. denied, 317 N.C. 715, 347 S.E.2d 457 (1986).

Conversion of Private Condemnation Proceeding into Quiet Title Action. — Trial court did not err by applying § 1A-1, Rule 15(b) in such a way as to convert condemnation proceeding brought by private condemnors, with the consent of the parties, into an action to quiet title. VEPCO v. Tillett, 316 N.C. 73, 340 S.E.2d 62, cert. denied, 317 N.C. 715, 347 S.E.2d 457 (1986).

ARTICLE 2.

Condemnation Proceedings by Private Condemnors.

§ 40A-19. Proceedings by private condemnors.

CASE NOTES

Applicability of Rules of Civil Procedure to Private Condemnation Proceedings. — This section, together with § 1-393, gives trial courts clear authority to apply the Rules of Civil Procedure, § 1A-1, in private condemnation proceedings, at least to the extent that those rules do not directly conflict with procedures specifically mandated by this Chapter. VEPCO v. Tillett, 316 N.C. 73, 340 S.E.2d 62, cert. denied, 317 N.C. 715, 347 S.E.2d 457 (1986).

Conversion of Private Condemnation Proceeding into Quiet Title Action. — Trial court did not err by applying § 1A-1, Rule 15(b) in such a way as to convert condemnation proceeding brought by private condemnors with the consent of the parties, into an action to quiet title. VEPCO v. Tillett, 316 N.C. 73, 340 S.E.2d 62, cert. denied, 317 N.C. 715, 347 S.E.2d 457 (1986).

Cited in VEPCO v. Tillett, 80 N.C. App. 383, 343 S.E.2d 188 (1986); Carolina Tel. & Tel. Co. v. McLeod, 321 N.C. 426, 364 S.E.2d 399 (1988).

§ 40A-22. Service.

CASE NOTES

Applied in VEPCO v. Tillett, 73 N.C. App. 512, 327 S.E.2d 2 (1985).

§ 40A-28. Exceptions to report; hearing; when title vests; appeal; restitution.

CASE NOTES

II. Exceptions and Appeals.

II. EXCEPTIONS AND APPEALS.

Filing Exceptions to Commissioner's Report as Prerequisite to Filing of Appeal. — The respondents failed to make any exceptions to the Commissioner's report. They also failed to file exceptions to the clerk's final judgment. Therefore, respondents' appeal was properly dismissed. Carolina Power & Light Co. v. Crowder, 89 N.C. App. 578, 366 S.E.2d 499 (1988).

ARTICLE 3.

Condemnation by Public Condemnors.

§ 40A-40. Notice of action.

Local Modification. — City of Durham: 1993, c. 476, s. 1.

Cross References. — As to requirement for consent of the board of commissioners in certain counties before land may be condemned or acquired by a unit of local government outside the county, see § 153A-15.

CASE NOTES

Cited in Yandle v. Mecklenburg County, 85 N.C. App. 382, 355 S.E.2d 216 (1987).

§ 40A-41. Institution of action and deposit.

Local Modification. — Cabarrus: 1985, c. 194, s. 2. For additional local modifications to this section, see the main pamphlet.

CASE NOTES

Stated in Yandle v. Mecklenburg County, 85 N.C. App. 382, 355 S.E.2d 216 (1987).

Cited in Dare County Bd. of Educ. v. Sakaria, 118 N.C. App. 609, 456 S.E.2d 842 (1995).

§ 40A-42. Vesting of title and right of possession; injunction not precluded.

(a) When a local public condemnor is acquiring property by condemnation for a purpose set out in G.S. 40A-3(b)(1), (4) or (7), or when a city is acquiring property for a purpose set out in G.S. 160A-311(1), (2), (3), (4), (6), or (7), or when a county is acquiring property for a purpose set out in G.S. 153A-274(1), (2) or (3), or when a condemnor is acquiring property by condemnation as authorized by G.S. 40A-3(c)(8), (9), (10) or (12), title to the property and the right to immediate possession shall vest pursuant to this subsection. Unless an action for injunctive relief has been initiated, title to the property specified in the complaint, together with the right to immediate possession thereof, shall vest in the condemnor upon the filing of the complaint and the making of the deposit in accordance with G.S. 40A-41.

(b) When a local public condemnor is acquiring property by condemnation for purposes other than for the purposes listed in subsection (a) above, title to the property taken and the right to possession shall vest in the condemnor pursuant to this subsection. Unless an action for injunctive relief has been initiated, title to the property specified in the complaint, together with the right to immediate possession thereof, shall vest in the condemnor:

(1) Upon the filing of an answer by the owner who requests only that there be a determination of just compensation and who does not challenge the authority of the condemnor to condemn the property; or

(2) Upon the failure of the owner to file an answer within the 120-day time period established by G.S. 40A-46; or

(3) Upon the disbursement of the deposit in accordance with the provisions of G.S. 40A-44.

(c) If the property is owned by a private condemnor, the vesting of title in the condemnor and the right to immediate possession of the property shall not become effective until the superior court has rendered final judgment (after any appeals) that the property is not in actual public use or is not necessary to the operation of the business of the owner, as set forth in G.S. 40A-5(b).

(d) If the answer raises any issues other than the issue of compensation, the issues so raised shall be determined under the provisions of G.S. 40A-47.

(e) The judge shall enter such orders in the cause as may be required to place the condemnor in possession.

(f) The provisions of this section shall not preclude or otherwise affect any remedy of injunction available to the owner or the condemnor. (1981, c. 919, s. 1; 1989 (Reg. Sess., 1990), c. 871, s. 1.)

Local Modification. — Cabarrus: 1991 (Reg. Sess., 1992), c. 937, s. 2; 1993 (Reg. Sess., 1994), c. 700, s. 1; Duplin: 1993 (Reg. Sess., 1994), c. 608, s. 1; Franklin: 1989, c. 432, s. 1; Guilford: 1987, c. 669, s. 4; Person: 1983, c. 829; Wake: 1985, c. 640, s. 2; cities of Greensboro and High Point: 1987, c. 669, s. 4; town of Holly Springs: 1985 (Reg. Sess., 1986), c. 941; town of Wrightsville Beach: 1993, c. 187, s. 2. For additional local modifications to this section, see the main pamphlet.

CASE NOTES

Subsection (a) does not grant landowner a statutory right to bring an action for injunctive relief to bar condemnation proceeding and to prevent the title and the right to immediate possession of the property from vesting in defendant when under § 40A-45 landowner has an adequate remedy of law. Tradewinds Campground, Inc. v. Town of Atlantic Beach, 90 N.C. App. 601, 369 S.E.2d 365, cert. denied, 323 N.C. 180, 373 S.E.2d 126 (1988).

Title of Defendants Holding Property as Tenants by Entirety Need Not Be Divested Simultaneously in Condemnation Proceeding. — Where plaintiff acquired title to defendants' interest in certain property owned by them as tenants by the entirety, and even though plaintiff argued such title on separate dates, this Chapter contains no requirement that title to condemned property be divested simultaneously. Town of Chapel Hill v. Burchette, 100 N.C. App. 157, 394 S.E.2d 698 (1990).

Effect of Answer Which Did Not Contest Plaintiff's Power to Condemn. — Where, in condemnation proceeding original answer of defendant property owner contested only amount of compensation due and did not contest power of plaintiff to condemn property, title to defendant's interest vested in plaintiff at that time, and plaintiff's filing of amended complaint did not void defendant's original answer. Town of Chapel Hill v. Burchette, 100 N.C. App. 157, 394 S.E.2d 698 (1990).

Cited in UNCC Properties, Inc. v. Greene, 111 N.C. App. 391, 432 S.E.2d 699 (1993).

§ 40A-45. Answer, reply and plat.

CASE NOTES

Section 40A-42(a) does not grant landowner a statutory right to bring an action for injunctive relief to bar condemnation proceeding and to prevent the title and the right to immediate possession of the property from vesting in defendant when under this section landowner has an adequate remedy of law. Tradewinds Campground, Inc. v. Town of Atlantic Beach, 90 N.C. App. 601, 369 S.E.2d 365, cert. denied, 323 N.C. 180, 373 S.E.2d 126 (1988).

Property Owners Not Entitled to Injunctive Relief. — As subdivision (a)(3) of this section gave owners an opportunity to raise in court the issue of pending voluntary annexation proceeding, they had an adequate remedy at law and were not entitled to injunctive relief granted by the trial court, enjoining county from proceeding with condemnation proceeding. Yandle v. Mecklenburg County, 85 N.C. App. 382, 355 S.E.2d 216, cert. denied, 320 N.C. 798, 361 S.E.2d 91 (1987).

§ 40A-46. Time for filing answer; failure to answer.

CASE NOTES

Applied in Town of Chapel Hill v. Burchette, 100 N.C. App. 157, 394 S.E.2d 698 (1990).

§ 40A-47. Determination of issues other than damages.

CASE NOTES

A municipality is solely liable for the damages that inevitably or necessarily flow from the construction of an improvement in keeping with the design of the condemnor, and contract provisions which require that work be accomplished upon public property or upon private property for which the city holds an easement do not alter the city's liability for such damages. City of Winston-Salem v. Ferrell, 79 N.C. App. 103, 338 S.E.2d 794 (1986).

Damages to land outside city's easements which inevitably or necessarily flow from the construction of the outfall result in an appropriation of land for public use. Such damages are embraced within the just compensation to which defendant landowners are entitled. City of Winston-Salem v. Ferrell, 79 N.C. App. 103, 338 S.E.2d 794 (1986).

Denial of Jury Trial on Issue of Ownership Upheld. — In special proceedings for condemnation of land for an airport, trial judge did not err in denying motion for a jury trial on the issue of ownership of the property, as the issue of ownership was not triable by a jury of right, and moreover, appellant did not demand a trial by jury in writing within the prescribed time. Raleigh-Durham Airport Auth. v. Howard, 88 N.C. App. 207, 363 S.E.2d 184 (1987), cert. denied, 322 N.C. 113, 367 S.E.2d 916 (1988).

Cited in City of Winston-Salem v. Ferrell, 79 N.C. App. 103, 338 S.E.2d 794 (1986); Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

§ 40A-48. Appointment of commissioners.

CASE NOTES

Cited in Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

§ 40A-51. Remedy where no declaration of taking filed; recording memorandum of action.

CASE NOTES

An inverse condemnation remedy is now provided in this jurisdiction by this section. City of Winston-Salem v. Ferrell, 79 N.C. App. 103, 338 S.E.2d 794 (1986).

Inverse condemnation is simply a device to force a governmental body to exercise its power of condemnation, even though it may have no desire to do so. It allows a property owner to obtain compensation for a taking in fact, even though no formal exercise of the taking power has occurred. Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

What Constitutes a "Project" Under this Section. — Although defendant designated the entire widening of the road as a "project," where there was evidence that individual sections were also referred to as "projects," because the road was widened in sections by different contractors, and there were beginning and ending points to the widening of each section, these individual sections met the definition of "projects" for purposes of subsection (a). McAdoo v. City of Greensboro, 91 N.C. App. 570, 372 S.E.2d 742 (1988).

Where plaintiffs sued for inverse condemnation by city whose road widening project was composed of many separate projects performed by more than one contractor, the plaintiffs had 24 months from the completion of the individual section of road encroaching upon their property which for purposes of subsection (a) was the "project" involving the taking. McAdoo v. City of Greensboro, 91 N.C. App. 570, 372 S.E.2d 742 (1988).

Applicability of Subsection (c). — Although subsection (c) provides that "nothing in this action shall in any manner affect an owner's common-law right to bring an action in tort for damage to his property," it was not relevant in an inverse condemnation case, since an owner has no common-law right to bring a trespass action against a city. McAdoo v. City of Greensboro, 91 N.C. App. 570, 372 S.E.2d 742 (1988).

Defendants' assertion of a counterclaim in condemnation action by city, alleging that property not included therein had been taken, properly placed the inverse condemnation issue before the court. City of Winston-Salem v. Ferrell, 79 N.C. App. 103, 338 S.E.2d 794 (1986).

Remedy for Municipal Airport Overflight. — Private landowners no longer have any private common-law actions for damages in trespass or nuisance in municipal airport overflight cases; their sole remedy is inverse condemnation. Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

This section provided the sole procedure by which plaintiffs could bring an inverse condemnation action involving a taking occurring as a result of the construction and operation of an airport runway. Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

No simple test exists for determining when a taking occurs by aircraft overflights; rather, a particularized judgment of the facts of the individual case is necessary. Thus the date requirement of this section does not impose any stringent standard of specificity. Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

Plaintiffs' allegation of a very general taking by aircraft overflights "within the past two years" failed to allege with reasonable specificity when the alleged appropriation or taking occurred; however, rather than dismissing the complaint altogether, the court should have required plaintiffs to come forward in accordance with defendant's motion for a more definite statement and plead the facts which they possessed, so that the court could then rule on their timeliness and sufficiency. Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

The statutory time begins to run on completion of the project or the taking, whichever is later. Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

The statutory time begins to run, etc. — The individual section of widened roadway, which constituted the taking by inverse condemnation of plaintiff's property, was not completed until the maintenance period was completed; the statutory period runs from the completion of the "project," which does not necessarily mean it runs from the completion of construction. McAdoo v. City of Greensboro, 91 N.C. App. 570, 372 S.E.2d 742 (1988).

Limitation Period for Taking Occurring Prior to Enactment of Chapter. — Where plaintiffs' action involving a taking incident to construction of an airport runway accrued in June 1979, and over two years later, in July 1981, new Chapter 40A was enacted, the period between such enactment and the cutoff date under the new limitation, five months and three weeks (July 10, 1981 to January 1, 1982) was not itself so unreasonably short as to deny plaintiffs due process of law, particularly in light of the fact that plaintiffs lived in an area where large numbers of inverse condemnation actions were filed within the statutory period. Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

A municipality is solely liable for the damages that inevitably or necessarily flow from the construction of an improvement in keeping with the design of the condemnor, and contract provisions which require that work be accomplished upon public property or upon private property for which the city holds an easement do not alter the city's liability for such damages. City of Winston-Salem v. Ferrell, 79 N.C. App. 103, 338 S.E.2d 794 (1986).

Damages to land outside city's easements which inevitably or necessarily flow from the construction of the outfall result in an appropriation of land for public use. Such damages are embraced within the just compensation to which defendant landowners are entitled. City of Winston-Salem v. Ferrell, 79 N.C. App. 103, 338 S.E.2d 794 (1986).

Migration of Cases from City Landfill. — Because this section, the inverse condemnation provision, provides a landowner's only remedy for alleged damage in the nature of a "taking," the court granted summary judgment as to multi-family apartment complex developer's state, common-law claims for nuisance, trespass, and negligence based on migration of methane gases from city landfill. Ashley Park Charlotte Assocs. v. City of Charlotte, 827 F. Supp. 1223 (W.D.N.C. 1993).

Strict Liability Action Was Not Precluded. — Developer's strict liability claim based on migration of methane gases from city landfill based on the North Carolina Oil Pollution and Hazardous Substances Control Act of 1978 was not preempted by this section. Ashley Park Charlotte Assocs. v. City of Charlotte, 827 F. Supp. 1223 (W.D.N.C. 1993).

Assessment of Costs. — Where although city filed a Declaration of Taking, it did not include property held to have been inversely condemned, the court's assessment of costs under § 40A-8 was proper. City of Winston-Salem v. Ferrell, 79 N.C. App. 103, 338 S.E.2d 794 (1986).

Applied in City of Raleigh v. Hollingsworth, 96 N.C. App. 260, 385 S.E.2d 513 (1989).

Stated in Yates v. Jamison, 782 F.2d 1182 (4th Cir. 1986).

Cited in VEPCO v. Tillett, 80 N.C. App. 383, 343 S.E.2d 188 (1986); Batch v. Town of Chapel Hill, 92 N.C. App. 601, 376 S.E.2d 22 (1989); Finch v. City of Durham, 325 N.C. 352, 384 S.E.2d 8 (1989); Naegele Outdoor Adv., Inc. v. City of Durham, 803 F. Supp. 1068 (M.D.N.C. 1992); Guilford County Dep't of Emergency Servs. v. Seaboard Chem. Corp., 114 N.C. App. 1, 441 S.E.2d 177, cert. denied, 336 N.C. 604, 447 S.E.2d 390 (1994).

§ 40A-55. Payment of compensation.

CASE NOTES

Denial of Jury Trial on Issue of Ownership Upheld. — In special proceedings for condemnation of land for an airport, trial judge did not err in denying motion for a jury trial on the issue of ownership of the property, as the issue of ownership was not triable by a jury of right, and moreover, appellant did not demand a trial by jury in writing within the prescribed time. Raleigh-Durham Airport Auth. v. Howard, 88 N.C. App. 207, 363 S.E.2d 184 (1987), cert. denied, 322 N.C. 113, 367 S.E.2d 916 (1988).

Cited in In re Lee, 85 N.C. App. 302, 354 S.E.2d 759 (1987).

ARTICLE 4.

Just Compensation.

§ 40A-62. Application.

CASE NOTES

Real Property Valuations for Ad Valorem Purposes Admissible. — Evidence of real property valuations made by the county for ad valorem tax purposes are admissible against the county, in an eminent domain proceeding, as an admission of a party opponent. Craven County v. Hall, 87 N.C. App. 256, 360 S.E.2d 479 (1987), cert. denied, 321 N.C. 471, 364 S.E.2d 919 (1988).

Cited in Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

§ 40A-63. In general.

CASE NOTES

Valuation of Land as of Date of Taking. — In determining the fair market value of property taken in condemnation, it is generally regarded as competent to show the value of the property within a reasonable time before and/or after the taking as bearing upon its value at the time of the appropriation. Craven County v. Hall, 87 N.C. App. 256, 360 S.E.2d 479 (1987), cert. denied, 321 N.C. 471, 364 S.E.2d 919 (1988).

Price of Reconveyed Property. — Section 136-19, when read consistently with this section and § 40A-65, as well as with the Fifth Amendment to the U.S. Const., dictates that the State not profit from overreaching seizures by eminent domain; therefore, Department of Transportation (DOT) was required to reconvey property acquired by eminent domain but unused by the DOT to the assigns of the original owner at the original purchase price, plus interest at the legal rate compounded annually. Ferrell v. DOT, 104 N.C. App. 42, 407 S.E.2d 601 (1991), aff'd, 334 N.C. 650, 435 S.E.2d 309 (1993).

Stated in Ferrell v. DOT, 334 N.C. 650, 435 S.E.2d 309 (1993).

§ 40A-64. Compensation for taking.

CASE NOTES

Landowner's Son Competent to Give Opinion of Land Value. — The son of a landowner who had exhibited a great deal of familiarity with the property, as well as neighboring properties, and was familiar with the value of these properties was competent to give an opinion as to the land value. Craven County v. Hall, 87 N.C. App. 256, 360 S.E.2d 479 (1987), cert. denied, 321 N.C. 471, 364 S.E.2d 919 (1988).

The sales prices of voluntary sales of property similar in nature, location, and condition to the land being condemned is admissible as evidence of the value of that land if the other sales are not too remote in time. Whether the properties are sufficiently similar to admit such evidence is a question to be determined by the trial judge in his sound discretion, usually after a hearing on the issue conducted out of the presence of the jury. City of Winston-Salem v. Cooper, 315 N.C. 702, 340 S.E.2d 366 (1986).

Evidence Sufficient for Jury Question. — Where defendant landowner's evidence consisted of the before and after values of the tract that sewer line easement affected, there was sufficient evidence to go to the jury. Guilford County v. Kane, 114 N.C. App. 243, 441 S.E.2d 556 (1994).

Measure of compensation to one who loses right to remove sand and gravel from the property of another, when that right has never been exercised and the sand and gravel remain in the ground untouched, is the fair market value of the sand and gravel in place. In re Lee, 85 N.C. App. 302, 354 S.E.2d 759, cert. denied, 320 N.C. 513, 358 S.E.2d 520 (1987).

Where petitioner which had the contractual right to remove sand and gravel from property which was condemned, failed to show by credible and convincing evidence the value of its interest in the condemned land, petitioner was entitled to nominal damages only. In re Lee, 85 N.C. App. 302, 354 S.E.2d 759, cert. denied, 320 N.C. 513, 358 S.E.2d 520 (1987).

Stated in Yates v. Jamison, 782 F.2d 1182 (4th Cir. 1986).

§ 40A-65. Effect of condemnation procedure on value.

CASE NOTES

Price of Reconveyed Property. — Section 136-19, when read consistently with § 40A-63 and this section, as well as with the Fifth Amendment to the U.S. Const., dictates that the State not profit from overreaching seizures by eminent domain; therefore, Department of Transportation (DOT) was required to reconvey property acquired by eminent domain but unused by the DOT to the assigns of the original owner at the original purchase price, plus interest at the legal rate compounded annually. Ferrell v. DOT, 104 N.C. App. 42, 407 S.E.2d 601 (1991), aff'd, 334 N.C. 650, 435 S.E.2d 309 (1993).

Evidence of Highest and Best Use as If Not Under "Cloud of Condemnation" Was Proper. — In a condemnation action by an airport authority, the testimony of the condemnee's expert witness as to the property's highest and best use as if it had not been under a "cloud of condemnation" was proper. Since a property owner cannot capitalize on any increase in the property's value due to the reasonable likelihood that it will be acquired, the condemnor likewise cannot take advantage of any resulting decrease in the property due to the threat of condemnation. Raleigh-Durham Airport Auth. v. King, 75 N.C. App. 57, 330 S.E.2d 622 (1985).

§ 40A-67. Entire tract.

CASE NOTES

Inchoate Dower Interest Sufficient. — A person's inchoate dower interest in his spouse's real property is interest sufficient to constitute an interest and estate in land for purposes of unity of ownership under this section. City of Winston-Salem v. Yarbrough, 117 N.C. App. 340, 451 S.E.2d 358 (1994).

Land Used as Integrated Economic Unit. — Defendants' tracts of land, which defendants were holding for future development, were "being used as an integrated economic unit," as required under this section. City of Winston-Salem v. Yarbrough, 117 N.C. App. 340, 451 S.E.2d 358 (1994).

ARTICLE 5.

Return of Condemned Property.

§ 40A-70. Return of condemned property.

Whenever a public condemnor listed in G.S. 40A-3(b) or (c) acquires real property by condemnation and thereafter determines that the property is not needed for the purpose for which it was condemned, and the public condemnor still owns the property, the public condemnor may reconvey the property to the original owner upon payment to the public condemnor of the full price paid to the owner when the property was taken by eminent domain, the cost of any improvements, together with interest at the legal rate to the date when the decision was made to offer the return of the property. Unless the public condemnor acquired the entire lot, block, or tract of land belonging to the original owner, the original owner must own the remainder of the original lot, block, or tract of land from which the property was acquired to purchase the property pursuant to this section. The public condemnor shall specify a date by which the property must be reconveyed and the payment made, which may not be less than 30 days after written notification to the original owner that the public condemnor has decided to offer the return of the property. (1991 (Reg. Sess., 1992), c. 980, s. 1.)

Editor's Note. — Session Laws 1991 (Reg. Sess., 1992), c. 980, s. 2 made this article effective upon ratification. The act was ratified July 20, 1992.

Chapter 41.

Estates.

Article 1.

Survivorship Rights and Future Interests.

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41-28. Definitions.
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41-33. Prospective application.

ARTICLE 1.

Survivorship Rights and Future Interests.

§ 41-1. Fee tail converted into fee simple.

Every person seized of an estate in tail shall be deemed to be seized of the same in fee simple. (1784, c. 204, s. 5; R.C., c. 43, s. 1; Code, s. 1325; Rev., s. 1578; C.S., s. 1734; 1995, c. 190, s. 1; c. 525, s. 1.)

Effect of Amendments. — Session Laws 1995, c. 190, s. 1, effective October 1, 1995, designated the existing provisions of this chapter as Article 1, Survivorship Rights and Future Interests.

Session Laws 1995, c. 525, s. 1, effective October 1, 1995, designated the existing provisions of this chapter as Article 1, Survivorship Rights and Future Interests.

Legal Periodicals. —

For note discussing the enforceability of assessments against property owners in residential developments in light of Figure Eight Beach Homeowners' Ass'n v. Parker, 62 N.C. App. 367, 303 S.E.2d 336, cert. denied, 309 N.C. 320, 307 S.E.2d 170 (1983), see 7 Campbell L. Rev. 33 (1984).

For article, "Does the Fee Tail Exist in North Carolina?," see 23 Wake Forest L. Rev. 767 (1988).

For article, "Requiem for the Rule in Shelley's Case," see 67 N.C.L. Rev. 681 (1989).

CASE NOTES

I. General Consideration.
III. Application and Illustrative Cases.

I. GENERAL CONSIDERATION.

Editor's Note. *— The cases under this section in the main volume were decided prior to the enactment of § 41-6.3, which abolished the rule in Shelley's case.*

III. APPLICATION AND ILLUSTRATIVE CASES.

Child Adopted by Unmarried Daughter. — Where will provided for remainder interest to an unmarried daughter "to have and to hold the same to her and the heirs of her body," any child adopted by her would satisfy the conditions of the will and could inherit as a bodily heir. Russell v. Russell, 101 N.C. App. 284, 399 S.E.2d 415, cert. denied, 328 N.C. 577, 403 S.E.2d 514 (1991).

Devise to testator's wife for her natural life and at her death to testator's daughter and "her bodily heirs" vested a life estate in the land to the wife, with an estate tail in remainder to the daughter, whose interest was converted under this section into a defeasible fee simple, and, even though the wife conveyed her present life estate interest to her daughter, the daughter's interest could only be defeated in the event that she died without having children. Russell v. Russell, 101 N.C. App. 284, 399 S.E.2d 415, discretionary review denied, 328 N.C. 577, 403 S.E.2d 514 (1991).

§ 41-2. Survivorship in joint tenancy defined; proviso as to partnership.

Except as otherwise provided herein, in all estates, real or personal, held in joint tenancy, the part or share of any tenant dying shall not descend or go to the surviving tenant, but shall descend or be vested in the heirs, executors, or administrators, respectively, of the tenant so dying, in the same manner as estates held by tenancy in common: Provided, that estates held in joint tenancy for the purpose of carrying on and promoting trade and commerce, or any useful work or manufacture, established and pursued with a view of profit to the parties therein concerned, are vested in the surviving partner, in order to enable him to settle and adjust the partnership business, or pay off the debts which may have been contracted in pursuit of the joint business; but as soon as the same is effected, the survivor shall account with, and pay, and deliver to the heirs, executors and administrators respectively of such deceased partner all such part, share, and sums of money as he may be entitled to by virtue of the original agreement, if any, or according to his share or part in the joint concern, in the same manner as partnership stock is usually settled between joint merchants and the representatives of their deceased partners. Nothing in this section prevents the creation of a joint tenancy with right of survivorship in real or personal property if the instrument creating the joint tenancy expressly provides for a right of survivorship, and no other document shall be necessary to establish said right of survivorship. Upon conveyance to a third party by less than all of three or more joint tenants holding property in joint tenancy with right of survivorship, a tenancy in common is created among the third party and the remaining joint tenants, who remain joint tenants with right of survivorship as between themselves. Upon conveyance to a third party by one of two joint tenants holding property in joint tenancy with right of survivorship, a tenancy in common is created between the third party and the remaining joint tenant. A conveyance of any interest in real property by a party to himself and one or more other parties, as joint tenants with right of survivorship, creates in the parties that interest, if the instrument of conveyance expressly provides for a joint tenancy with right of survivorship. (1784, c. 204, s. 6; R.C., c. 43, s. 2; Code, s. 1326; Rev., s. 1579; C.S., s. 1735; 1945, c. 635; 1989 (Reg. Sess., 1990), c. 891, s. 1; 1991, c. 606, s. 1.)

Editor's Note. — Session Laws 1989 (Reg. Sess., 1990), c. 891, which amended this section, provided in s. 3: "Nothing in this act shall be construed to affect the validity of instruments that provide for a right of survivorship executed prior to the effective date of this act." The act became effective January 1, 1991.

Session Laws 1991, c. 606, which amended this section, in section 2 provides: "A conveyance of any interest in real property occurring between January 1, 1991, and the effective date of this act [October 1, 1991] by a party to himself and one or more other parties that expressly provides for a joint tenancy with a right of survivorship shall have created such an interest."

Legal Periodicals. —

For article, "Class Gifts in North Carolina — When Do We 'Call The Roll'?," see 21 Wake Forest L. Rev. 1 (1985).

For article, "The Joint Tenancy Makes a Comeback in North Carolina," see 69 N.C.L. Rev. 491 (1991).

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Survivorship Only Abolished as Incident of Joint Tenancy. —

Right of survivorship has been statutorily abolished where it follows as legal incident to an existing joint tenancy. In re Estate of Heffner, 99 N.C. App. 327, 392 S.E.2d 770 (1990), decided under law in effect prior to § 53-146.1.

Parties who wish to create a right of survivorship applicable to joint bank accounts must comply with requirements of § 41-2.1(a). In re Estate of Heffner, 99 N.C. App. 327, 392 S.E.2d 770 (1990), decided under law in effect prior to § 53-146.1.

Cited in McLain v. Wilson, 91 N.C. App. 275, 371 S.E.2d 151 (1988).

§ 41-2.1. Right of survivorship in bank deposits created by written agreement.

Legal Periodicals. —

For article, "The Joint Tenancy Makes a Comeback in North Carolina," see 69 N.C.L. Rev. 491 (1991).

CASE NOTES

Listing Survivorship Accounts on 90-Day Inventory Held Not to Make Accounts Part of Estate for Purpose of Right to Dissent. — Where executrix listed one-half of funds in survivorship accounts on 90-day inventory to comply with subdivisions (b)(3) and (4) of this section, listing accounts for this purpose on 90-day inventory did not make funds a part of net estate for purposes of determining right to dissent under § 30-1. In re Estate of Francis, 327 N.C. 101, 394 S.E.2d 150 (1990).

Joint Bank Accounts with Survivorship Created Under Subsection (a) of This Section. — Because right of survivorship has been statutorily abolished where it follows as legal incident to existing joint tenancy, parties who wish to create right of survivorship applicable to joint bank accounts must comply with requirements of subsection (a) of this section. In re Estate of Heffner, 99 N.C. App. 327, 392 S.E.2d 770 (1990), decided under law in effect prior to § 53-146.1.

Account Established Under Subsection (a) Not Part of Net Estate. — Funds held by testator-spouse in joint tenancy with right of survivorship with third party established pursuant to subsection (a) of this section do not become part of testator-spouse's net estate for purposes of dissent statute. In re Estate of Francis, 327 N.C. 101, 394 S.E.2d 150 (1990).

Written agreement not signed by party asserting rights as a survivor is not sufficient to satisfy statutory requirements of subsection (a) of this section. In re Estate of Heffner, 99 N.C. App. 327, 392 S.E.2d 770 (1990), decided under law in effect prior to § 53-146.1.

Plain language of this section clearly requires that both parties sign a written agreement. In re Estate of Heffner, 99 N.C. App. 327, 392 S.E.2d 770 (1990), decided under law in effect prior to § 53-146.1.

Where signature cards for savings and loan association accounts designated both parties "as joint tenants with right of survivorship" and instructed the savings and loan association "to act pursuant to any one or more of the joint tenants' signatures, shown below, in any manner in connection with this account and, ... to pay, without any liability for such payment, to any one or the survivor or survivors at any time," the withdrawal clause indicating that withdrawals were to be made only by the deceased party would be disregarded and the contractual terms allowing both parties the right to act in any manner regarding the account controlled. McLain v. Wilson, 91 N.C. App. 275, 371 S.E.2d 151 (1988), cert. denied, 324 N.C. 328, 377 S.E.2d 749 (1989).

Survivorship Account Not Created. — Where the materials of the parties showed without contradiction that though plaintiff and codepositor intended to establish a joint savings account with the right of survivorship, codepositor died before signing the agreement, the statutory terms for creating a survivorship account were not complied with, and plaintiff's action seeking the release of funds held in the savings account, titled in his name and that of the decedent, had no basis. Powell v. First Union Nat'l Bank, 98 N.C. App. 227, 390 S.E.2d 461 (1990).

Applied in Napier v. High Point Bank & Trust Co., 100 N.C. App. 390, 396 S.E.2d 620 (1990); Holloway v. Wachovia Bank & Trust Co., 104 N.C. App. 631, 410 S.E.2d 915 (1991).

Cited in Miller v. Miller, 117 N.C. App. 71, 450 S.E.2d 15 (1994).

§ 41-2.2. Joint ownership of corporate stock and investment securities.

(a) In addition to other forms of ownership, shares of corporate stock or investment securities may be owned by any parties as joint tenants with rights of survivorship, and not as tenants in common, in the manner provided in this section.

(b)(1) A joint tenancy in shares of corporate stock or investment securities as provided by this section shall exist when such shares or securities indicate that they are owned with the right of survivorship, or otherwise clearly indicate an intention that upon the death of either party the interest of the decedent shall pass to the surviving party.

(2) Such a joint tenancy may also exist when a broker or custodian holds the shares or securities for the joint tenants and by book entry or otherwise indicates (i) that the shares or securities are owned with the right of survivorship, or (ii) otherwise clearly indicates that upon the death of either party, the interest of the decedent shall pass to the surviving party. Money in the hands of such broker or custodian derived from the sale of, or held for the purpose of, such shares or securities shall be treated in the same manner as such shares or securities.

(c) Upon the death of a joint tenant his interest shall pass to the surviving joint tenant. The interest of the deceased joint tenant, even though it has passed to the surviving joint tenant, remains liable for the debts of the decedent in the same manner as the personal property included in his estate, and recovery thereof shall be made from the surviving joint tenant when the decedent's estate is insufficient to satisfy such debts.

(d) Nothing herein contained shall be construed to repeal or modify any of the provisions of G.S. 105-2, 105-11, and 105-24, relating to the administration of the inheritance tax laws, or any other provisions of the law relating to inheritance taxes. (1967, c. 864, s. 1; 1969, c. 1115, s. 2; 1989 (Reg. Sess., 1990), c. 891, s. 2.)

Editor's Note. — Session Laws 1989 (Reg. Sess., 1990), c. 891, which amended this section, provided in s. 3: "Nothing in this act shall be construed to affect the validity of instruments that provide for a right of survivorship executed prior to the effective date of this act." The act became effective January 1, 1991.

Legal Periodicals. —

For article, "The Joint Tenancy Makes a Comeback in North Carolina," see 69 N.C.L. Rev. 491 (1991).

§ 41-2.5. Tenancy by the entirety in mobile homes.

CASE NOTES

Security interest in a mobile home which was moveable, tangible property, was governed by Article 9 of the U.C.C. subsection (a) of this section, which provides that when a husband and wife become co-owners of a mobile home, in the absence of anything to the contrary appearing in the instrument of title, they become tenants by the entirety with all the incidents of an estate by the entirety in real property, does not dictate a contrary result. Joyce v. Cloverbrook Homes, Inc., 81 N.C. App. 270, 344 S.E.2d 58, cert. denied, 317 N.C. 704, 347 S.E.2d 42 (1986).

§ 41-4. Limitations on failure of issue.

Legal Periodicals. —

For article, "Class Gifts in North Carolina — When Do We 'Call The Roll'?," see 21 Wake Forest L. Rev. 1 (1985).

For article, "Does the Fee Tail Exist in North Carolina?," see 23 Wake Forest L. Rev. 767 (1988).

For note, "Rawls v. Early: A Refusal to Imply Conditions of Survivorship Upon Ascertained Contingent Remaindermen," see 68 N.C.L. Rev. 1343 (1990).

CASE NOTES

Editor's Note. — *The cases under this section in the main volume were decided prior to the enactment of § 41-6.3, which abolished the rule in Shelley's case.*

Purpose of Section. —

The purpose of this section is to sustain the contingent interest created by the testator and ensure that the interest will pass in possession when and if the contingency occurs, even if the occurrence is after the death of the testator. Therefore, when the contingency is fulfilled the limitation is deemed to take effect. Hollowell v. Hollowell, 107 N.C. App. 166, 420 S.E.2d 827, aff'd, 333 N.C. 706, 430 S.E.2d 235 (1993).

§ 41-5. Unborn infant may take by deed or writing.

Legal Periodicals. —

For note on the wrongful death of a viable fetus, see 23 Wake Forest L. Rev. 849 (1988).

§ 41-6. "Heirs" construed to be "children" in certain limitations.

Legal Periodicals. —

For article, "Class Gifts in North Carolina — When Do We 'Call The Roll'?," see 21 Wake Forest L. Rev. 1 (1985).

For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Editor's Note. *— The cases under this section in the main volume were decided prior to the enactment of § 41-6.3, which abolished the rule in Shelley's case.*

§ 41-6.1. Meaning of "next of kin."

Legal Periodicals. — For article, "Class Gifts in North Carolina — When Do We 'Call The Roll'?," see 21 Wake Forest L. Rev. 1 (1985).

CASE NOTES

At the time of death of testatrix who died May 22, 1962, "next of kin" and, by implication, "nearest relatives" still retained their very narrow technical common-law meaning. Rawls v. Rideout, 74 N.C. App. 368, 328 S.E.2d 783 (1985).

Construction with § 28A-4-1. — For purposes of § 28A-4-1, "next of kin" refers to the class of blood relatives of the decedent, thus the court erred in determining that the term was synonymous with "heirs," as used in this section. In re Estate of Bryant, 116 N.C. App. 329, 447 S.E.2d 468 (1994).

§ 41-6.3. Rule in Shelley's case abolished.

The rule of property known as the rule in Shelley's case is abolished. (1987, c. 706, s. 1.)

Editor's Note. — Session Laws 1987, c. 706, s. 2 made this section effective October 1, 1987, and applicable to transfers of property that take effect on or after that date.

§ 41-7. Possession transferred to use in certain conveyances.

Legal Periodicals. — For article, "Does the Fee Tail Exist in North Carolina?," see 23 Wake Forest L. Rev. 767 (1988).

§ 41-10. Titles quieted.

CASE NOTES

I. General Consideration.
II. Nature and Scope of Remedy.
  B. Interest Necessary to Bring Action.
III. Pleading and Practice.
  A. In General.
  C. Jurisdiction of Courts.

I. GENERAL CONSIDERATION.

This section is highly remedial. — This statute is remedial in nature, designed to provide a means for determining all adverse claims to land, including those formerly encompassed within the equitable proceedings to remove clouds on title. Boyd v. Watts, 73 N.C. App. 566, 327 S.E.2d 46 (1985), rev'd in part, 316 N.C. 622, 342 S.E.2d 840 (1986).

Burden on Plaintiffs. — In an action to quiet title under this section plaintiffs bear the burden of proving valid title in themselves which may be accomplished by either (1) reliance on the Real Property Marketable Title Act, or (2) utilization of traditional methods of proving title. Chappell v. Donnelly, 113 N.C. App. 626, 439 S.E.2d 802 (1994).

If title becomes involved in a processioning proceeding, etc. —

Where the only issue to be tried is the location of a dividing line, it is a processioning proceeding under Chapter 38. However, where title to the land is put in issue the clerk has no authority to pass on any question involved. He must transfer the proceeding to the regular session of superior court where it becomes in effect an action to quiet title pursuant to this section. Cobb v. Spurlin, 73 N.C. App. 560, 327 S.E.2d 244 (1985).

No statute of limitations runs against plaintiff bringing action for removal of a cloud upon title. Such an action is a continuing right, which exists as long as there is occasion for its exercise. Poore v. Swan Quarter Farms, Inc., 79 N.C. App. 286, 338 S.E.2d 817 (1986).

But Theory of Relief May Determine Applicability of Limitations. — There is no express statute of limitations governing actions to quiet title under this section. It thus is necessary to refer to plaintiffs' underlying theory of relief to determine which statute, if any, applies. Poore v. Swan Quarter Farms, Inc., 79 N.C. App. 286, 338 S.E.2d 817 (1986).

When Quiet Title Actions Are Treated as Ejectment Actions. — Actions to remove a cloud upon title are in essence ejectment actions and are properly reviewed as such where defendants are in actual possession and plaintiffs seek to recover possession. Poore v. Swan Quarter Farms, Inc., 79 N.C. App. 286, 338 S.E.2d 817 (1986).

Action Held Not One for Ejectment. — Where plaintiffs made no specific allegation that defendants were in actual possession at the time of the filing of their action, and did not seek specifically to recover possession in their demand for relief, but merely prayed for rents and profits and removal of certain deeds as a cloud upon their title, plaintiffs' action was not in essence one for ejectment controlled by §§ 1-38 and 1-40; rather, plaintiffs' action was one to remove a cloud upon title which was not barred by any statute of limitations. Poore v. Swan Quarter Farms, Inc., 79 N.C. App. 286, 338 S.E.2d 817 (1986).

Applied in VEPCO v. Tillett, 73 N.C. App. 512, 327 S.E.2d 2 (1985).

Cited in Williams v. Sapp, 83 N.C. App. 116, 349 S.E.2d 304 (1986); Ballance v. Dunn, 96 N.C. App. 286, 385 S.E.2d 522 (1989); Foreman v. Sholl, 113 N.C. App. 282, 439 S.E.2d 169 (1994), cert. improvidently granted and appeal dismissed, 339 N.C. 593, 453 S.E.2d 162 (1995).

II. NATURE AND SCOPE OF REMEDY.

B. Interest Necessary to Bring Action.

Failure to Prove Prescriptive Easement. — There was inadequate evidence to take the issue of a prescriptive easement to the jury because the defendants had the burden of proving the elements necessary for a prescriptive easement and failed to meet that burden. Nichols v. Wilson, 16 N.C. App. 286, 448 S.E.2d 119, cert. denied, 338 N.C. 519, 452 S.E.2d 814 (1994).

III. PLEADING AND PRACTICE.

A. In General.

Complaint Upheld. — Plaintiffs' complaint, which alleged that noncompliance with legal formalities voided two deeds, but did not allege fraud, despite failure to state specific facts underlying these allegations, nevertheless, under the liberal theory of notice pleading, was minimally sufficient to state a claim for relief under this section. Poore v. Swan Quarter Farms, Inc., 79 N.C. App. 286, 338 S.E.2d 817 (1986).

C. Jurisdiction of Courts.

Removal of Action to Federal Court. — Action to quiet title to real property in which plaintiff, the record owner, alleged that defendant had placed an IRS tax lien on the property, and that defendant's IRS tax lien was acting as a cloud on plaintiff's title and preventing plaintiff from selling or alienating the property was properly removed to federal district court, as the essential focus of plaintiff's action was the validity, priority, and extinguishment of the IRS tax lien. Wilkinson v. United States, 724 F. Supp. 1200 (W.D.N.C. 1989).

§ 41-10.1. Trying title to land where State claims interest.

CASE NOTES

Betterments claim is not a claim of title to land. It is, instead, a claim demanding payment for permanent improvements to the land over and above the value of the use and occupation of the land. State v. Taylor, 322 N.C. 433, 368 S.E.2d 601 (1988).

State Did Not Consent to Be Sued for Betterments. — Construing this section strictly, a claim for betterments is not a claim of title to land. The State therefore has not consented to be sued for betterments and is entitled to the full protection of its sovereign immunity. State v. Taylor, 322 N.C. 433, 368 S.E.2d 601 (1988).

"Claim of Title to Land" Cannot Be Broadened to Include Claim for Betterments. — Sovereign immunity is a common-law doctrine to which the existing exceptions or waivers have been mandated by the legislature, and statutes which waive the benefits of the doctrine of sovereign immunity are to be strictly construed. Thus, the phrase "claim of title to land" contained in this section cannot be broadened to include a claim for betterments under § 1-340. The betterments statute does not, by its terms, create a right against the State. State v. Taylor, 322 N.C. 433, 368 S.E.2d 601 (1988).

§ 41-11. Sale, lease or mortgage in case of remainders.

Legal Periodicals. — For article, "Requiem for the Rule in Shelley's Case," see 67 N.C.L. Rev. 681 (1989).

§ 41-11.1. Sale, lease or mortgage of property held by a "class," where membership may be increased by persons not in esse.

Legal Periodicals. — For article, "Requiem for the Rule in Shelley's Case," see 67 N.C.L. Rev. 681 (1989).

§ 41-12. Sales or mortgages of contingent remainders validated.

Legal Periodicals. — For article, "Requiem for the Rule in Shelley's Case," see 67 N.C.L. Rev. 681 (1989).

§ 41-14: Reserved for future codification purposes.

Article 2.

Uniform Statutory Rule Against Perpetuities.

Editor's Note. — Permission to include the Official Comments was granted by the National Conference of Commissioners on Uniform State Laws and The American Law Institute. It is believed that the Official Comments will prove of value to the practitioner in understanding and applying the text of this Chapter.

§ 41-15. Statutory rule against perpetuities.

(a) A nonvested property interest is invalid unless:

(1) When the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive; or

(2) The interest either vests or terminates within 90 years after its creation.

(b) A general power of appointment not presently exercisable because of a condition precedent is invalid unless:

(1) When the power is created, the condition precedent is certain to be satisfied or become impossible to satisfy no later than 21 years after the death of an individual then alive; or

(2) The condition precedent either is satisfied or becomes impossible to satisfy within 90 years after its creation.

(c) A nongeneral power of appointment or a general testamentary power of appointment is invalid unless:

(1) When the power is created, it is certain to be irrevocably exercised or otherwise to terminate no later than 21 years after the death of an individual then alive; or

(2) The power is irrevocably exercised or otherwise terminates within 90 years after its creation.

(d) In determining whether a nonvested property interest or a power of appointment is valid under subdivision (a)(1), (b)(1), or (c)(1) of this section, the possibility that a child will be born to an individual after the individual's death is disregarded.

(e) If, in measuring a period from the creation of a trust or other property arrangement, language in a governing instrument:

(1) Seeks to disallow the vesting or termination of any interest or trust beyond,

(2) Seeks to postpone the vesting or termination of any interest or trust until, or

(3) Seeks to operate in effect in any similar fashion upon,

the later of (i) the expiration of a period of time not exceeding 21 years after the death of the survivor of specified lives in being at the creation of the trust or other property arrangement or (ii) the expiration of a period of time that exceeds or might exceed 21 years after the death of the survivor of lives in being at the creation of the trust or other property arrangement, that language is inoperative to the extent it produces a period of time that exceeds 21 years after the death of the survivor of the specified lives. (1995, c. 190, s. 1.)

OFFICIAL COMMENT

A. General Purpose
B. Section 1(a)(1): Nonvested Property Interests that are Initially Valid
C. Section 1(a)(2): Wait-and-See — Nonvested Property Interests whose Validity is Initially in Abeyance
  1. The 90-Year Permissible Vesting Period
  2. Technical Violations of the Common-Law Rule
D. Sections 1(b)(1) and 1(c)(1): Powers of Appointment that are Initially Valid
E. Sections 1(b)(2) and 1(c)(2): Wait-and-See — Powers of Appointment whose Validity is Initially in Abeyance
F. The Validity of the Donee's Exercise of a Valid Power
G. Section 1(e): Effect of Certain "Later-of" Type Language; Coordination of Generation-Skipping Transfer Tax Regulations With Uniform Act
H. Subsidiary Common-Law Doctrines: Whether Superseded by this Act

Common-Law Rule Against Perpetuities Superseded. As provided in Section 9, this Act supersedes the common-law Rule Against Perpetuities (Common-law

Rule) in jurisdictions previously adhering to it (or repeals any statutory version or variation thereof previously in effect in the jurisdiction). The Common-law Rule (or the statutory version or variation thereof) is replaced by the Statutory Rule Against Perpetuities (Statutory Rule) set forth in this section and by the other provisions in this Act.

Subsidiary Doctrines Continue in Force Except to the Extent the Provisions of Act Conflict with Them. The courts in interpreting the Common-law Rule developed several subsidiary doctrines. In accordance with the general principle of statutory construction that statutes in derogation of the common law are to be construed narrowly, a subsidiary doctrine is superseded by this Act only to the extent the provisions of the Act conflict with it. A listing and discussion of such subsidiary doctrines, such as the constructional preference for validity, the all-or-nothing rule for class gifts, and the doctrine of infectious invalidity, appears later, in Part G of this Comment.

Application. Unless excluded by Section 4, the Statutory Rule Against Perpetuities (Statutory Rule) applies to nonvested property interests and to powers of appointment over property or property interests that are nongeneral powers, general testamentary powers, or general powers not presently exercisable because of a condition precedent.

The Statutory Rule does not apply to vested property interests (e.g., X's interest in Example (23) of this Comment) or to presently exercisable general powers of appointment (e.g., G's power in Example (19) of this Comment; G's power in Example (1) in the Comment to Section 2; A's power in Example (2) in the Comment to Section 2; X's power in Example (3) in the Comment to Section 2; A's noncumulative power of withdrawal in Example (4) in the Comment to Section 2).

A. GENERAL PURPOSE

Section 1 sets forth the Statutory Rule Against Perpetuities (Statutory Rule). As explained above, the Statutory Rule supersedes the Common-law Rule Against Perpetuities (Common-law Rule) or any statutory version or variation thereof.

The Common-law Rule's Validating and Invalidating Sides. The Common-law Rule Against Perpetuities is a rule of *initial* validity or invalidity. At common law, a nonvested property interest is either valid or invalid *as of its creation.* Like most rules of property law, the Common-law Rule has both a validating and an invalidating side. Both sides are derived from John Chipman Gray's formulation of the Common-law Rule:

> No [nonvested property] interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest.

J. Gray, The Rule Against Perpetuities § 201 (4th ed. 1942). From this formulation, the validating and invalidating sides of the Common-law Rule are derived as follows:

> *Validating Side of the Common-law Rule.* A nonvested property interest is valid when it is created (initially valid) if it is then *certain* to vest or terminate (fail to vest) — one or the other — no later than 21 years after the death of an individual then alive.
>
> *Invalidating Side of the Common-law Rule.* A nonvested property interest is invalid when it is created (initially invalid) if there is no such certainty.

Notice that the invalidating side focuses on a lack of *certainty*, which means that invalidity under the Common-law Rule is *not* dependent on *actual* post-creation events but only on *possible* post-creation events. *Actual* post-creation events are irrelevant, even those that are known at the time of the lawsuit. It is generally recognized that the *invalidating* side of the Common-law Rule is harsh because it can invalidate interests on the ground of possible post-creation events that are extremely unlikely to happen and that in actuality almost never do happen, if ever.

The Statutory Rule Against Perpetuities. The essential difference between the Common-law Rule and its statutory replacement is that the Statutory Rule preserves the Common-law Rule's overall policy of preventing property from being tied up in unreasonably long or even perpetual family trusts or other property arrangements, while eliminating the harsh potential of the Common-law Rule. The Statutory Rule achieves this result by codifying (in slightly revised form) the validating side of the Common-law Rule and modifying the invalidating side by adopting a wait-and-see element. Under the Statutory Rule, interests that would have been initially valid at common law continue to be initially valid, but interests that would have been initially invalid at common law are invalid only if they do not actually vest or terminate within the permissible vesting period set forth in Section 1(a)(2). Thus, the Uniform Act recasts the validating and invalidating sides of the Rule Against Perpetuities as follows:

> *Validating Side of the Statutory Rule*: A nonvested property interest is initially valid if, when it is created, it is then *certain* to vest or terminate (fail to vest) — one or the other — no later than 21 years after the death of an individual then alive. The validity of a nonvested property interest that is not *initially* valid is in abeyance. Such an interest is valid if it vests within the permissible vesting period after its creation.
>
> *Invalidating Side of the Statutory Rule*: A nonvested property interest that is not *initially* valid becomes invalid (and subject to reformation under Section 3) if it neither vests nor terminates within the permissible vesting period after its creation.

As indicated, this modification of the invalidating side of the Common-law Rule is generally known as the wait-and-see method of perpetuity reform. The wait-and-see method of perpetuity reform was approved by the American Law Institute as part of the Restatement (Second) of Property (Donative Transfers) §§ 1.1-1.6 (1983). For a discussion of the various methods of perpetuity reform, including the wait-and- see method and the Restatement (Second)'s version of wait-and-see, see Waggoner, Perpetuity Reform, 81 Mich.L.Rev. 1718 (1983).

B. SECTION 1(a)(1): NONVESTED PROPERTY INTERESTS THAT ARE INITIALLY VALID

Nonvested Property Interest. Section 1(a) sets forth the Statutory Rule Against Perpetuities with respect to nonvested property interests. A nonvested property interest (also called a contingent property interest) is a future interest in property that is subject to an unsatisfied condition precedent. In the case of a class gift, the interests of all the unborn members of the class are nonvested because they are subject to the unsatisfied condition precedent of being born. At common law, the interests of all potential class members must be valid or the class gift is invalid. As pointed out in more detail later in this Comment, this so-called all-or-nothing rule with respect to class gifts is not superseded by this Act, and so remains in effect under the Statutory Rule. Consequently, all class gifts that are subject to open are to be regarded as nonvested property interests for the purposes of this Act.

Section 1(a)(1) Codifies the Validating Side of the Common-law Rule. The validating side of the Common-law Rule is codified in Section 1(a)(1) (and, with respect to powers of appointment, in Sections 1(b)(1) and 1(c)(1)).

A nonvested property interest that satisfies the requirement of Section 1(a)(1) is initially valid. That is, it is valid as of the time of its creation. There is no need to subject such an interest to the waiting period set forth in Section 1(a)(2), nor would it be desirable to do so.

For a nonvested property interest to be valid as of the time of its creation under Section 1(a)(1), there must then be a *certainty* that the interest will either vest or terminate — an interest terminates when vesting becomes impossible — no later than 21 years after the death of an individual then alive. To satisfy this requirement, it must be established that there is no possible chain of events that might arise after the interest was created that would allow the interest to vest or terminate after the expiration of the 21-year period following the death of an individual in being at the creation of the interest. Consequently, initial validity under Section 1(a)(1) can be established only if there is an individual for whom there is a causal connection between the individual's death and the interest's vesting or terminating no later than 21 years thereafter. *The individual described in subsection (a)(1) (and subsections (b)(1) and (c)(1) as well) is often referred to as the "validating life," the term used throughout the Comments to this Act.*

Determining Whether There is a Validating Life. The process for determining whether a validating life exists is to postulate the death of each individual connected in some way to the transaction, and ask the question: Is there with respect to this individual an invalidating chain of possible events? If one individual can be found for whom the answer is No, that individual can serve as the validating life. As to that individual there will be the requisite causal connection between his or her death and the questioned interest's vesting or terminating no later than 21 years thereafter.

In searching for a validating life, only individuals who are connected in some way to the transaction need to be considered, for they are the only ones who have a chance of supplying the requisite causal connection. Such individuals vary from situation to situation, but typically include the beneficiaries of the disposition, including the taker or takers of the nonvested property interest, and individuals related to them by blood or adoption, especially in the ascending and descending lines. There is no point in even considering the life of an individual unconnected to the transaction — an individual from the world at large who happens to be in being at the creation of the interest. No such individual can be a validating life because there will be an invalidating chain of possible events as to every unconnected individual who might be proposed: Any such individual can immediately die after the creation of the nonvested property interest without causing any acceleration of the interest's vesting or termination. (The life expectancy of any unconnected individual, or even the probability that one of a number of new-born babies will live a long life, is irrelevant.)

Example (1) — Parent of Devisees as the Validating Life. G devised property "to A for life, remainder to A's children who attain 21." G was survived by his son (A), by his daughter (B), by A's wife (W), and by A's two children (X and Y). The nonvested property interest in favor of A's children who reach 21 satisfies Section 1(a)(1)'s requirement, and the interest is initially valid. When the interest was created (at G's death), the interest was then certain to vest or terminate no later than 21 years after A's death.

The process by which A is determined to be the validating life is one of testing various candidates to see if any of them have the requisite causal connection. As noted above, no one from the world at large can have the requisite causal connection, and so such individuals are disregarded. Once the inquiry is narrowed to the appropriate candidates, the first possible validating life that comes to mind is A, who does in fact fulfill the requirement: Since A's death cuts off the possibility of any more children being born to him, it is impossible, no matter when A dies, for any of A's children to be alive and under the age of 21 beyond 21 years after A's death. (See the discussion of subsection (d), below.)

A is therefore the validating life for the nonvested property interest in favor of A's children who attain 21. None of the other individuals who is connected to this transaction could serve as the validating life because an invalidating chain of possible post-creation events exists as to each one of them. The other individuals who might be considered include W, X, Y, and B. In the case of W, an invalidating chain of events is that she might predecease A, A might remarry and have a child by his new wife, and such child might be alive and under the age of 21 beyond the 21-year period following W's death. With respect to X and Y, an invalidating chain of events is that they might predecease A, A might later have another child, and that child might be alive and under 21 beyond the 21-year period following the death of the survivor of X and Y. As to B, she suffers from the same invalidating chain of events as exists with respect to X and Y. The fact that none of these other individuals can serve as the validating life is of no consequence, however, because only one such individual is required for the validity of a nonvested interest to be established, and that individual is A.

The Rule of Subsection (d). The rule established in subsection (d) plays a significant role in the search for a validating life. Subsection (d) declares that the possibility that a child will be born to an individual after the individual's death is to be disregarded. It is important to note that this rule applies only for the purposes of determining the validity of an interest (or power of appointment) under paragraph (1) of subsection (a), (b), or (c). The rule of subsection (d) does not apply, for example, to questions such as whether or not a child who is born to an individual after the individual's death qualifies as a taker of a beneficial interest — as a member of a class or otherwise. Neither subsection (d), nor any other provision of this Act, supersedes the widely accepted common-law principle, sometimes codified, that a child in gestation (a child sometimes described as a child *en ventre sa mere*) who is later born alive is regarded as alive at the commencement of gestation.

The limited purpose of subsection (d) is to solve a perpetuity problem caused by advances in medical science. The problem is illustrated by a case such as Example (1), above — "to A for life, remainder to A's children who reach 21." When the Common-law Rule was developing, the possibility was recognized, strictly speaking, that one or more of A's children might reach 21 more than 21 years after A's death. The possibility existed because A's wife (who might not be a life in being) might be pregnant when A died. If she was, and if the child was born viable a few months after A's death, the child could not reach his or her 21st birthday within 21 years after A's death. The device then invented to validate the interest of A's children was to "extend" the allowable perpetuity period by tacking on a period of gestation, if needed. As a result, the common-law perpetuity period was comprised of three components: (1) a life in being (2) plus 21 years (3) plus a period of gestation, when needed. Today, thanks to sperm banks, frozen embryos, and even the possibility of artificially maintaining the body functions of deceased pregnant women long enough to develop the fetus to viability (see Detroit Free Press, July 31, 1986, at 5A; Ann Arbor News, Oct. 30, 1978, at C5 (AP story); N.Y. Times, Dec. 6, 1977, at 30; N.Y. Times, Dec. 2, 1977, at B16) — advances in medical science unanticipated when the Common-law Rule was in its developmental stages — having a pregnant wife at death is no longer the only way of having children after death. These medical developments, and undoubtedly others to come, make the mere addition of a period of gestation inadequate as a device to confer initial validity under Section 1(a)(1) on the interest of A's children in the above example. The rule of subsection (d), however, *does* insure the initial validity of the children's interest. Disregarding the possibility that children of A will be born after his death allows A to be the validating life. None of his children, under this assumption, can reach 21 more than 21 years after his death.

Note that subsection (d) subsumes not only the case of children conceived after death, but also the more conventional case of children in gestation at death. With subsection (d) in place, the third component of the common-law perpetuity period is unnecessary and has been jettisoned. The perpetuity period recognized in paragraph (1) of subsections (a), (b), and (c) has only two components: (1) a life in being (2) plus 21 years.

As to the legal status of conceived-after-death children, that question has not yet been resolved. For example, if in Example (1) it in fact turns out that A does leave sperm on deposit at a sperm bank and if in fact A's wife does become pregnant as a result of artificial insemination, the child or children produced thereby might not be included at all in the class gift. Cf. Restatement (Second) of Property (Donative Transfers) Introductory Note to Ch. 26 at pp. 2-3 (Tent. Draft No. 9, 1986). Without trying to predict how that matter will be settled in the future, the best way to handle the problem from the perpetuity perspective is subsection (d)'s rule requiring the possibility of post-death children to be disregarded.

Recipients as Their Own Validating Lives. It is well established at common law that, in appropriate cases, the recipient of an interest can be his or her own validating life. See, e.g., Rand v. Bank of California, 236 Or. 619, 388 P.2d 437 (1964). Given the right circumstances, this principle can validate interests that are contingent on the recipient's reaching an age in excess of 21, or are contingent on the recipient's surviving a particular point in time that is or might turn out to be in excess of 21 years after the interest was created or after the death of a person in being at the date of creation.

Example (2) — Devisees as Their Own Validating Lives. G devised real property "to A's children who attain 25." A predeceased G. At G's death, A had three living children, all of whom were under 25.

The nonvested property interest in favor of A's children who attain 25 is validated by Section 1(a)(1). Under subsection (d), the possibility that A will have a child born to him after his death (and since A predeceased G, after G's death) must be disregarded. Consequently, even if A's wife survived G, and even if she was pregnant at G's death or even if A had deposited sperm in a sperm bank prior to his death, it must be assumed that all of A's children are in being at G's death. A's children are, therefore, their own validating lives. (Note that subsection (d) requires that in determining whether an individual is a validating life, the possibility that a child will be born to "an" individual after the individual's death must be disregarded. The validating life and the individual whose having a post-death child is disregarded need not be the same individual.) Each one of A's children, all of whom under subsection (d) are regarded as alive at G's death, will either reach the age of 25 or fail to do so within his or her own lifetime. To say this another way, it is certain to be known no later than at the time of the death of each child whether or not that child survived to the required age.

Validating Life Can Be Survivor of Group. In appropriate cases, the validating life need not be individualized at first. Rather the validating life can initially (i.e., when the interest was created) be the unidentified survivor of a group of individuals. It is common in such cases to say that the members of the group are the validating *lives*, but the true meaning of the statement is that the validating *life* is the member of the group who turns out to live the longest. As the court said in Skatterwood v. Edge, 1 Salk. 229, 91 Eng. Rep. 203 (K.B. 1697), "for let the lives be never so many, there must be a survivor, and so it is but the length of that life; for Twisden used to say, the candles were all lighted at once."

Example (3) — Case of Validating Life Being the Survivor of a Group. G devised real property "to such of my grandchildren as attain 21." Some of G's children are living at G's death.

The nonvested property interest in favor of G's grandchildren who attain 21 is valid under Section 1(a)(1). The validating life is that one of G's children who turns out to live the longest. Since under subsection (d), it must be assumed that none of G's children will have post-death children, it is regarded as impossible for any of G's grandchildren to be alive and under 21 beyond the 21-year period following the death of G's last surviving child.

Example (4) — Sperm Bank Case. G devised property in trust, directing the income to be paid to G's children for the life of the survivor, then to G's grandchildren for the life of the survivor, and on the death of G's last surviving grandchild, to pay the corpus to G's great-grandchildren then living. G's children all predeceased him, but several grandchildren were living at G's death. One of G's predeceased children (his son, A) had deposited sperm in a sperm bank. A's widow was living at G's death.

The nonvested property interest in favor of G's great-grandchildren is valid under Section 1(a)(1). The validating life is the last surviving grandchild among the grandchildren living at G's death. Under subsection (d), the possibility that A will have a child conceived after G's death must be disregarded. Note that subsection (d) requires that in determining whether an individual is a validating life, the possibility that a child will be born to "an" individual after the individual's death is disregarded. The validating life and the individual whose having a post-death child is disregarded need not be the same individual. Thus in this example, by disregarding the possibility that *A* will have a conceived-after-death child, G's *last surviving grandchild* becomes the validating life because G's last surviving grandchild is deemed to have been alive at G's death, when the great-grandchildren's interests were created.

Example (5) — Child in Gestation Case. G devised property in trust, to pay the income equally among G's living children; on the death of G's last surviving child, to accumulate the income for 21 years; on the 21st anniversary of the death of G's last surviving child, to pay the corpus and accumulated income to G's then-living descendants, per stirpes; if none, to X Charity. At G's death his child (A) was 6 years old, and G's wife (W) was pregnant. After G's death, W gave birth to their second child (B).

The nonvested property interests in favor of G's descendants and in favor of X Charity are valid under Section 1(a)(1). The validating life is A. Under subsection (d), the possibility that a child will be born to an individual after the individual's death must be disregarded *for the purposes of determining validity under Section 1(a)(1).* Consequently, the possibility that a child will be born to G after his death must be disregarded; and the possibility that a child will be born to any of G's descendants after their deaths must also be disregarded.

Note, however, that the rule of subsection (d) does *not* apply to the question of the entitlement of an after-born child to take a beneficial interest in the trust. The common-law rule (sometimes codified) that a child in gestation is treated as alive, if the child is subsequently born viable, applies to this question. Thus, subsection (d) does *not* prevent B from being an income beneficiary under G's trust, nor does it prevent a descendant in gestation on the 21st anniversary of the death of G's last surviving child from being a member of the class of G's "then-living descendants," as long as such descendant has no then-living ancestor who takes instead.

Different Validating Lives Can and in Some Cases Must Be Used. Dispositions of property sometimes create more than one nonvested property interest. In such cases, the validity of each interest is treated individually. A validating life that validates one interest might or might not validate the other interests. Since it is not necessary that the same validating life be used for all interests created by a disposition, the search for a validating life for each of the other interests must be undertaken separately.

Perpetuity Saving Clauses and Similar Provisions. Knowledgeable lawyers almost routinely insert perpetuity saving clauses into instruments they draft. Saving clauses contain two components, the first of which is the *perpetuity-period component.* This component typically requires the trust or other arrangement to terminate no later than 21 years after the death of the last survivor of a group of individuals designated therein by name or class. (The lives of corporations, animals, or sequoia trees cannot be used.) The second component of saving clauses is the *gift-over component.* This component expressly creates a gift over that is guaranteed to vest at the termination of the period set forth in the perpetuity-period component, but only if the trust or other arrangement has not terminated earlier in accordance with its other terms.

It is important to note that regardless of what group of individuals is designated in the perpetuity-period component of a saving clause, the surviving member of the group is not necessarily the individual who would be the validating life for the nonvested property interest or power of appointment in the absence of the saving clause. Without the saving clause, one or more interests or powers may in fact fail to satisfy the requirement of paragraph (1) of subsections (a), (b), or (c) for initial validity. By being designated in the saving clause, however, the survivor of the group becomes the validating life for all interests and powers in the trust or other arrangement: The saving clause confers on the last surviving member of the designated group the requisite causal connection between his or her death and the impossibility of any interest or power in the trust or other arrangement remaining in existence beyond the 21-year period following such individual's death.

Example (6) — Valid Saving Clause Case. A testamentary trust directs income to be paid to the testator's children for the life of the survivor, then to the testator's grandchildren for the life of the survivor, corpus on the death of the testator's last living grandchild to such of the testator's descendants as the last living grandchild shall by will appoint; in default of appointment, to the testator's then-living descendants, per stirpes. A saving clause in the will terminates the trust, if it has not previously terminated, 21 years after the death of the testator's last surviving descendant who was living at the testator's death. The testator was survived by children.

In the absence of the saving clause, the nongeneral power of appointment in the last living grandchild and the nonvested property interest in the gift-in-default clause in favor of the testator's descendants fail the test of Sections 1(a)(1) and 1(c)(1) for initial validity. That is, were it not for the saving clause, there is no validating life. However, the surviving member of the designated group becomes the validating life, so that the saving clause does confer initial validity on the nongeneral power of appointment and on the nonvested property interest under Sections 1(a)(1) and 1(c)(1).

If the governing instrument designates a group of individuals that would cause it to be impracticable to determine the death of the survivor, the common-law courts have developed the doctrine that the validity of the nonvested property interest or power of appointment is determined as if the provision in the governing instrument did not exist. See cases cited in Restatement (Second) of Property (Donative Transfers) (1983), Reporter's Note No. 3 at p. 45. See also Restatement (Second) of Property (Donative Transfers) § 1.3(1) Comment a (1983); Restatement of Property § 374 and Comment l (1944); 6 American Law of Property § 24.13 (A. Casner ed. 1952); 5A R. Powell, The Law of Real Property Para. 766[5] (1985); L. Simes & A. Smith, The Law of Future Interests § 1223 (2d ed. 1956). If, for example, the designated group in Example (6) were the residents of X City (or the members of Y Country Club) living at the time of the testator's death, the saving clause would not validate the power of appointment or the nonvested property interest. Instead, the validity of the power of appointment and the nonvested property interest would be determined as if the provision in the governing instrument did not exist. Since without the saving clause the power of appointment and the nonvested property interest would fail to satisfy the requirements of Sections 1(a)(1) and 1(c)(1) for initial validity, their validity would be governed by Sections 1(a)(2) and 1(c)(2).

The application of the above common-law doctrine, which is not superseded by this Act and so remains in full force, is not limited to saving clauses. It also applies to trusts or other arrangements where the period thereof is directly linked to the life of the survivor of a designated group of individuals. An example is a trust to pay the income to the grantor's descendants from time to time living, per stirpes, for the period of the life of the survivor of a designated group of individuals living when the nonvested property interest or power of appointment in question was created, plus the 21-year period following the survivor's death; at the end of the 21-year period, the corpus is to be divided among the grantor's then-living descendants, per stirpes, and if none, to the XYZ Charity. If the group of individuals so designated is such that it would be impracticable to determine the death of the survivor, the validity of the disposition is determined as if the provision in the governing instrument did not exist. The term of the trust is therefore governed by the 90-year permissible vesting period of paragraph (2) of subsections (a), (b), or (c) of the Statutory Rule.

Additional references. Restatement (Second) of Property (Donative Transfers) § 1.3(1) (1983), and the Comments thereto; Waggoner, *Perpetuity Reform*, 81 Mich.L.Rev. 1718, 1720-1726 (1983).

C. SECTION 1(a)(2): WAIT-AND-SEE — NONVESTED PROPERTY INTERESTS WHOSE VALIDITY IS INITIALLY IN ABEYANCE

Unlike the Common-law Rule, the Statutory Rule Against Perpetuities does not automatically invalidate nonvested property interests for which there is no validating life. A nonvested property interest that does not meet the requirements for validity under Section 1(a)(1) might still be valid under the wait-and-see provisions of Section 1(a)(2). Such an interest is invalid under Section 1(a)(2) only if in actuality it does not vest (or terminate) during the permissible vesting period. Such an interest becomes invalid, in other words, only if it is still in existence and nonvested when the permissible vesting period expires.

1. *The 90-Year Permissible Vesting Period*

Since a wait-and-see rule against perpetuities, unlike the Common-law Rule, makes validity or invalidity turn on *actual* post-creation events, it requires that an actual period of time be measured off during which the contingencies attached to an interest are allowed to work themselves out to a final resolution. The Statutory Rule Against Perpetuities establishes a permissible vesting period of 90 years. Nonvested property interests that have neither vested nor terminated at the expiration of the 90-year permissible vesting period become invalid.

As explained in the Prefatory Note, the permissible vesting period of 90 years is *not* an arbitrarily selected period of time. On the contrary, the 90-year period represents a reasonable approximation of — a proxy for — the period of time that would, *on average*, be produced through the use of an actual set of measuring lives identified by statute and then adding the traditional 21-year tack-on period after the death of the survivor.

2. *Technical Violations of the Common-Law Rule*

One of the harsh aspects of the invalidating side of the Common-law Rule, against which the adoption of the wait-and-see element in Section 1(a)(2) is designed to relieve, is that nonvested property interests at common law are invalid even though the invalidating chain of possible events *almost* certainly will *not* happen. In such cases, the violation of the Common-law Rule could be said to be merely technical. Nevertheless, at common law, the nonvested property interest is invalid.

Cases of technical violation fall generally into discrete categories, identified and named by Professor Leach in *Perpetuities in a Nutshell*, 51 Harv.L.Rev. 638 (1938), as the fertile octogenarian, the administrative contingency, and the unborn widow. The following three examples illustrate how Section 1(a)(2) affects these categories.

Example (7) — Fertile Octogenarian Case. G devised property in trust, directing the trustee to pay the net income therefrom "to A for life, then to A's children for the life of the survivor, and upon the death of A's last surviving child to pay the corpus of the trust to A's grandchildren." G was survived by A (a female who had passed menopause) and by A's two adult children (X and Y).

The remainder interest in favor of G's grandchildren would be invalid at common law, and consequently is not validated by Section 1(a)(1). There is no validating life because, under the common law's conclusive presumption of lifetime fertility, which is not superseded by this Act (see Part H, below), A *might* have a third child (Z), conceived and born after G's death, who will have a child conceived and born more than 21 years after the death of the survivor of A, X, and Y.

Under Section 1(a)(2), however, the remote possibility of the occurrence of this chain of events does not invalidate the grandchildren's interest. The interest becomes invalid only if it remains in existence and nonvested 90 years after G's death. The chance that the grandchildren's remainder interest will become invalid under Section 1(a)(2) is negligible.

Example (8) — Administrative Contingency Case. G devised property "to such of my grandchildren, born before or after my death, as may be living upon final distribution of my estate." G was survived by children and grandchildren.

The remainder interest in favor of A's grandchildren would be invalid at common law, and consequently is not validated by Section 1(a)(1). The final distribution of G's estate *might* not occur within 21 years of G's death, and after G's death grandchildren might be conceived and born who might survive or fail to survive the final distribution of G's estate more than 21 years after the death of the survivor of G's children and grandchildren who were living at G's death.

Under Section 1(a)(2), however, the remote possibility of the occurrence of this chain of events does not invalidate the grandchildren's remainder interest. The interest becomes invalid only if it remains in existence and nonvested 90 years after G's death. Since it is almost certain that the final distribution of G's estate will occur well within this 90-year period, the chance that the grandchildren's interest will be invalid is negligible.

Example (9) — Unborn Widow Case. G devised property in trust, the income to be paid "to my son A for life, then to A's spouse for her life, and upon the death of the survivor of A and his spouse, the corpus to be delivered to A's then living descendants." G was survived by A, by A's wife (W), and by their adult children (X and Y).

Unless the interest in favor of A's "spouse" is construed to refer only to W, rather than to whoever is A's spouse when he dies, if anyone, the remainder interest in favor of A's descendants would be invalid at common law, and consequently is not validated by Section 1(a)(1). There is no validating life because A's spouse *might* not be W; A's spouse might be someone who was conceived and born after G's death; she might outlive the death of the survivor of A, W, X, and Y by more than 21 years; and descendants of A might be born or die before the death of A's spouse but after the 21-year period following the death of the survivor of A, W, X, and Y.

Under Section 1(a)(2), however, the remote possibility of the occurrence of this chain of events does not invalidate the descendants' remainder interest. The interest becomes invalid only if it remains in existence and nonvested 90 years after G's death. The chance that the descendants' remainder interest will become invalid under the Statutory Rule is small.

Age Contingencies in Excess of 21. Another category of technical violation of the Common-law Rule arises in cases of age contingencies in excess of 21 where the takers cannot be their own validating lives (unlike Example (2), above). The violation of the Common-law Rule falls into the technical category because the insertion of a saving clause would in almost all cases allow the disposition to be carried out as written. In effect, the Statutory Rule operates like the perpetuity-period component of a saving clause.

Example (10) — Age Contingency in Excess of 21 Case. G devised property in trust, directing the trustee to pay the income "to A for life, then to A's children; the corpus of the trust is to be equally divided among A's children who reach the age of 30." G was survived by A, by A's spouse (H), and by A's two children (X and Y), both of whom were under the age of 30 when G died.

The remainder interest in favor of A's children who reach 30 is a class gift. At common law, the interests of *all* potential class members must be valid or the class gift is totally invalid. Leake v. Robinson, 2 Mer. 363, 35 Eng. Rep. 979 (Ch. 1817). This Act does not supersede the all-or-nothing rule for class gifts (see Part G, below), and so the all-or-nothing rule continues to apply under this Act. Although X and Y will either reach 30 or die under 30 within their own lifetimes, there is at G's death the possibility that A will have an afterborn child (Z) who will reach 30 or die under 30 more than 21 years after the death of the survivor of A, H, X, and Y. The class gift would be invalid at common law and consequently is not validated by Section 1(a)(1). Under Section 1(a)(2), however, the possibility of the occurrence of this chain of events does not invalidate the children's remainder interest. The interest becomes invalid only if an interest of a class member remains nonvested 90 years after G's death. Although unlikely, suppose that at A's death Z's age is such that he could be alive and under the age of 30 at the expiration of the allowable waiting period. Suppose further that at A's death X or Y or both is over the age of 30. The court, upon the petition of an interested person, must under Section 3 reform G's disposition. See Example (3) in the Comment to Section 3.

D. SECTIONS 1(b)(1) AND 1(c)(1): POWERS OF APPOINTMENT THAT ARE INITIALLY VALID

Powers of Appointment. Sections 1(b) and 1(c) set forth the Statutory Rule Against Perpetuities with respect to powers of appointment. A power of appointment is the authority, other than as an incident of the beneficial ownership of property, to designate recipients of beneficial interests in or powers of appointment over property. Restatement (Second) of Property (Donative Transfers) § 11.1 (1986). The property or property interest subject to a power of appointment is called the "appointive property."

The various persons connected to a power of appointment are identified by a special terminology. The "donor" is the person who created the power of appointment. The "donee" is the person who holds the power of appointment, i.e., the powerholder. The "objects" are the persons to whom an appointment can be made. The "appointees" are the persons to whom an appointment has been made. The "takers in default" are the persons whose property interests are subject to being defeated by the exercise of the power of appointment and who take the property to the extent the power is not effectively exercised. Restatement (Second) of Property (Donative Transfers) § 11.2 (1986).

A power of appointment is "general" if it is exercisable in favor of the donee of the power, the donee's creditors, the donee's estate, or the creditors of the donee's estate. A power of appointment that is not general is a "nongeneral" power of appointment. Restatement (Second) of Property (Donative Transfers) § 11.4 (1986).

A power of appointment is "presently exercisable" if, at the time in question, the donee can by an exercise of the power create an interest in or a power of appointment over the appointive property. Restatement (Second) of Property (Donative Transfers) § 11.5 (1986). A power of appointment is "testamentary" if the donee can exercise it only in the donee's will. Restatement of Property § 321 (1940). A power of appointment is "not presently exercisable because of a condition precedent" if the only impediment to its present exercisability is a condition precedent, i.e., the occurrence of some uncertain event. Since a power of appointment terminates on the donee's death, a deferral of a power's present exercisability until a future time (even a time certain) imposes a condition precedent that the donee be alive at that future time.

A power of appointment is a "fiduciary" power if it is held by a fiduciary and is exercisable by the fiduciary in a fiduciary capacity. A power of appointment that is exercisable in an individual capacity is a "nonfiduciary" power. As used in this Act, the term "power of appointment" refers to "fiduciary" and to "nonfiduciary" powers, unless the context indicates otherwise.

Although Gray's formulation of the Common-law Rule Against Perpetuities does not speak directly of powers of appointment, the Common-law Rule *is* applicable to powers of appointment (other than presently exercisable general powers of appointment). The principle of subsections (b)(1) and (c)(1) is that a power of appointment that satisfies the Common-law Rule Against Perpetuities is valid under the Statutory Rule Against Perpetuities, and consequently it can be validly exercised, without being subjected to a waiting period during which the power's validity is in abeyance.

Two different tests for validity are employed at common law, depending on what type of power is at issue. In the case of a *nongeneral power* (whether or not presently exercisable) and in the case of a *general testamentary power*, the power is initially valid if, when the power was created, it is certain that the latest possible time that the power can be exercised is no later than 21 years after the death of an individual then in being. In the case of a *general power not* *presently exercisable because of a condition precedent*, the power is initially valid if it is then certain that the condition precedent to its exercise will either be satisfied or become impossible to satisfy no later than 21 years after the death of an individual then in being. Subsections (b)(1) and (c)(1) codify these rules. Under either test, initial validity depends on the existence of a validating life. The procedure for determining whether a validating life exists is essentially the same procedure explained in Part B, above, pertaining to nonvested property interests.

Example (11) — Initially Valid General Testamentary Power Case. G devised property "to A for life, remainder to such persons, including A's estate or the creditors of A's estate, as A shall by will appoint." G was survived by his daughter (A).

A's power, which is a general testamentary power, is valid as of its creation under Section 1(c)(1). The test is whether or not the power can be exercised beyond 21 years after the death of an individual in being when the power was created (G's death). Since A's power cannot be exercised after A's death, the validating life is A, who was in being at G's death.

Example (12) — Initially Valid Nongeneral Power Case. G devised property "to A for life, remainder to such of A's descendants as A shall appoint." G was survived by his daughter (A).

A's power, which is a nongeneral power, is valid as of its creation under Section 1(c)(1). The validating life is A; the analysis leading to validity is the same as applied in Example (11), above.

Example (13) — Case of Initially Valid General Power Not Presently Exercisable Because of a Condition Precedent. G devised property "to A for life, then to A's first born child for life, then to such persons, including A's first born child or such child's estate or creditors, as A's first born child shall appoint." G was survived by his daughter (A), who was then childless.

The power in A's first born child, which is a general power not presently exercisable because of a condition precedent, is valid as of its creation under Section 1(b)(1). The power is subject to a condition precedent — that A have a child — but this is a contingency that under subsection (d) is deemed certain to be resolved one way or the other within A's lifetime. A is therefore the validating life: The power cannot remain subject to the condition precedent after A's death. Note that the latest possible time that the power can be exercised is at the death of A's first born child, which might occur beyond 21 years after the death of A (and anyone else who was alive when G died). Consequently, if the power conferred on A's first born child had been a nongeneral power or a general testamentary power, the power could not be validated by Section 1(c)(1); instead, the power's validity would be governed by Section 1(c)(2).

E. SECTIONS 1(b)(2) AND 1(c)(2): WAIT-AND-SEE — POWERS OF APPOINTMENT WHOSE VALIDITY IS INITIALLY IN ABEYANCE

Under the Common-law Rule, a *general power not presently exercisable because of a condition precedent* is invalid as of the time of its creation if the condition *might* neither be satisfied nor become impossible to satisfy within a life in being plus 21 years. A *nongeneral power* (whether or not presently exercisable) or a *general testamentary power* is invalid as of the time of its creation if it might not terminate (by irrevocable exercise or otherwise) within a life in being plus 21 years.

Sections 1(b)(2) and 1(c)(2), by adopting the wait-and-see method of perpetuity reform, shift the ground of invalidity from possible to actual post-creation events. Under these subsections, a power of appointment that would have violated the Common-law Rule, and therefore fails the subsection (b)(1) or (c)(1) tests for *initial* validity, is nevertheless not invalid as of the time of its creation. Instead, its validity is in abeyance. A general power not presently exercisable because of a condition precedent is invalid only if *in actuality* the condition neither is satisfied nor becomes impossible to satisfy within the 90-year permissible vesting period. A nongeneral power or a general testamentary power is invalid only if *in actuality* it does not terminate (by irrevocable exercise or otherwise) within the 90-year permissible period.

Example (14) — General Testamentary Power Case. G devised property "to A for life, then to A's first born child for life, then to such persons, including the estate or the creditors of the estate of A's first born child, as A's first born child shall by will appoint; in default of appointment, to G's grandchildren in equal shares." G was survived by his daughter (A), who was then childless, and by his son (B), who had two children (X and Y).

Since the general testamentary power conferred on A's first born child fails the test of Section 1(c)(1) for *initial* validity, its validity is governed by Section 1(c)(2). If A has a child, such child's death must occur within 90 years of G's death for any provision in the child's will purporting to exercise the power to be valid.

Example (15) — Nongeneral Power Case. G devised property "to A for life, then to A's first born child for life, then to such of G's grandchildren as A's first born child shall appoint; in default of appointment, to the children of G's late nephew, Q." G was survived by his daughter (A), who was then childless, by his son (B), who had two children (X and Y), and by Q's two children (R and S).

Since the nongeneral power conferred on A's first born child fails the test of Section 1(c)(1) for *initial* validity, its validity is governed by Section 1(c)(2). If A has a child, such child must exercise the power within 90 years after G's death or the power becomes invalid.

Example (16) — General Power Not Presently Exercisable Because of a Condition Precedent. G devised property "to A for life, then to A's first born child for life, then to such persons, including A's first born child or such child's estate or creditors, as A's first born child shall appoint after reaching the age of 25; in default of appointment, to G's grandchildren." G was survived by his daughter (A), who was then childless, and by his son (B), who had two children (X and Y).

The power conferred on A's first born child is a general power not presently exercisable because of a condition precedent. Since the power fails the test of Section 1(b)(1) for *initial* validity, its validity is governed by Section 1(b)(2). If A has a child, such child must reach the age of 25 (or die under 25) within 90 years after G's death or the power is invalid.

Fiduciary Powers. Purely administrative fiduciary powers are excluded from the Statutory Rule under Sections 4(2) and (3), but the only distributive fiduciary power that is excluded is the power described in Section 4(4). Otherwise, distributive fiduciary powers are subject to the Statutory Rule. Such powers are usually nongeneral powers.

Example (17) — Trustee's Discretionary Powers Over Income and Corpus. G devised property in trust, the terms of which were that the trustee was authorized to accumulate the income or pay it or a portion of it out to A during A's lifetime; after A's death, the trustee was authorized to accumulate the income or to distribute it in equal or unequal shares among A's children until the death of the survivor; and on the death of A's last surviving child to pay the corpus and accumulated income (if any) to B. The trustee was also granted the discretionary power to invade the corpus on behalf of the permissible recipient or recipients of the income.

The trustee's nongeneral powers to invade corpus and to accumulate or spray income among A's children are not excluded by Section 4(4), nor are they initially valid under Section 1(c)(1). Their validity is, therefore, governed by Section 1(c)(2). Both powers become invalid thereunder, and hence no longer exercisable, 90 years after G's death.

It is doubtful that the powers will become invalid, because the trust will probably terminate by its own terms earlier than the expiration of the permissible 90-year period. But if the powers do become invalid, and hence no longer exercisable, they become invalid as of the time the permissible 90-year period expires. Any exercises of either power that took place before the expiration of the permissible 90-year period are not invalidated retroactively. In addition, if the powers do become invalid, a court in an appropriate proceeding must reform the instrument in accordance with the provisions of Section 3.

F. THE VALIDITY OF THE DONEE'S EXERCISE OF A VALID POWER

The fact that a power of appointment is valid, either because it (i) was not subject to the Statutory Rule to begin with, (ii) is initially valid under Sections 1(b)(1) or 1(c)(1), or (iii) becomes valid under Sections 1(b)(2) or 1(c)(2), means merely that the power can be validly exercised. It does not mean that any exercise that the donee decides to make is valid. The validity of the interests or powers created by the exercise of a valid power is a separate matter, governed by the provisions of this Act. A key factor in deciding the validity of such appointed interests or appointed powers is determining when they were created for purposes of this Act. Under Section 2, as explained in the Comment thereto, the time of creation is when the power was exercised if it was a presently exercisable general power; and if it was a nongeneral power or a general testamentary power, the time of creation is when the power was created. This is the rule generally accepted at common law (see Restatement (Second) of Property (Donative Transfers) § 1.2, Comment d (1983); Restatement of Property § 392 (1944)), and it is the rule adopted under this Act (except for purposes of Section 5 only, as explained in the Comment to Section 5).

Example (18) — Exercise of a Nongeneral Power of Appointment. G was the life income beneficiary of a trust and the donee of a nongeneral power of appointment over the succeeding remainder interest, exercisable in favor of M's descendants (except G). The trust was created by the will of G's mother, M, who predeceased him. G exercised his power by his will, directing the income to be paid after his death to his brother B's children for the life of the survivor, and upon the death of B's last surviving child, to pay the corpus of the trust to B's grandchildren. B predeceased M; B was survived by his two children, X and Y, who also survived M and G.

G's power and his appointment are valid. The power and the appointed interests were created at M's death when the power was created, not on G's death when it was exercised. See Section 2. G's power passes Section 1(c)(1)'s test for initial validity: G himself is the validating life. G's appointment also passes Section 1(a)(1)'s test for initial validity: Since B was dead at M's death, the validating life is the survivor of B's children, X and Y.

Suppose that G's power was exercisable only in favor of G's own descendants, and that G appointed the identical interests in favor of his own children and grandchildren. Suppose further that at M's death, G had two children, X and Y, and that a third child, Z, was born later. X, Y, and Z survived G. In this case, the remainder interest in favor of G's grandchildren would not pass Section 1(a)(1)'s test for initial validity. Its validity would be governed by Section 1(a)(2), under which it would be valid if G's last surviving child died within 90 years after M's death.

If G's power were a general testamentary power of appointment, rather than a nongeneral power, the solution would be the same. The period of the Statutory Rule with respect to interests created by the exercise of a general testamentary power starts to run when the power was created (at M's death, in this example), not when the power was exercised (at G's death).

Example (19) — Exercise of a Presently Exercisable General Power of Appointment. G was the life income beneficiary of a trust and the donee of a presently exercisable general power of appointment over the succeeding remainder interest. G exercised the power by deed, directing the trustee after his death to pay the income to G's children in equal shares for the life of the survivor, and upon the death of his last surviving child to pay the corpus of the trust to his grandchildren.

The validity of G's power is not in question: A presently exercisable general power of appointment is not subject to the Statutory Rule Against Perpetuities. G's appointment, however, is subject to the Statutory Rule. If G reserved a power to revoke his appointment, the remainder interest in favor of G's grandchildren passes Section 1(a)(1)'s test for initial validity. Under Section 2, the appointed remainder interest was created at G's death. The validating life for his grandchildren's remainder interest is G's last surviving child.

If G's appointment were irrevocable, however, the grandchildren's remainder interest fails the test of Section 1(a)(1) for initial validity. Under Section 2, the appointed remainder interest was created upon delivery of the deed exercising G's power (or when the exercise otherwise became effective). Since the validity of the grandchildren's remainder interest is governed by Section 1(a)(2), the remainder interest becomes invalid, and the disposition becomes subject to reformation under Section 3, if G's last surviving child lives beyond 90 years after the effective date of G's appointment.

Example (20) — Exercises of Successively Created Nongeneral Powers of Appointment. G devised property to A for life, remainder to such of A's descendants as A shall appoint. At his death, A exercised his nongeneral power by appointing to his child B for life, remainder to such of B's descendants as B shall appoint. At his death, B exercised his nongeneral power by appointing to his child C for life, remainder to C's children. A and B were living at G's death. Thereafter, C was born. A later died, survived by B and C. B then died survived by C.

A's nongeneral power passes Section 1(c)(1)'s test for initial validity. A is the validating life. B's nongeneral power, created by A's appointment, also passes Sections 1(c)(1)'s test for initial validity. Since under Section 2 the appointed interests and powers are created at G's death, and since B was then alive, B is the validating life for his nongeneral power. (If B had been born after G's death, however, his power would have failed Section 1(c)(1)'s test for initial validity; its validity would be governed by Section 1(c)(2), and would turn on whether or not it was exercised by B within 90 years after G's death.)

Although B's power is valid, his exercise may be partly invalid. The remainder interest in favor of C's children fails the test of Section 1(a)(1) for initial validity. The period of the Statutory Rule begins to run at G's death, under Section 2. (Since B's power was a nongeneral power, B's appointment under the common-law relation back doctrine of powers of appointment is treated as having been made by A. If B's appointment related back no further than that, of course, it would have been validated by Section 1(a)(1) because C was alive at A's death. However, A's power was also a nongeneral power, so relation back goes another step. A's appointment — which now includes B's appointment — is treated as having been made by G.) Since C was not alive at G's death, he cannot be the validating life. And, since C might have more children more than 21 years after the deaths of A and B and any other individual who was alive at G's death, the remainder interest in favor of his children is not initially validated by Section 1(a)(1). Instead, its validity is governed by Section 1(a)(2), and turns on whether or not C dies within 90 years after G's death.

Note that if either A's power or B's power (or both) had been a general testamentary power rather than a nongeneral power, the above solution would not change. However, if either A's power or B's power (or both) had been a presently exercisable general power, B's appointment would have passed Sections 1(a)(1)'s test for initial validity. (If A had the presently exercisable general power, the appointed interests and power would be created at A's death, not G's; and if the presently exercisable general power were held by B, the appointed interests and power would be created at B's death.)

Common-Law "Second-look" Doctrine. As indicated above, both at common law and under this Act (except for purposes of Section 5 only, as explained in the Comment to Section 5), appointed interests and powers established by the exercise of a general testamentary power or a nongeneral power are created when the power was created, not when the power was exercised. In applying this principle, the common law recognizes a so-called doctrine of second look, under which the facts existing on the date of the exercise are taken into account in determining the validity of appointed interests and appointed powers. E.g., *Warren's Estate*, 320 Pa. 112, 182 A. 396 (1930); *In re Estate of Bird*, 225 Cal.App.2d 196, 37 Cal.Rptr. 288 (1964). The common-law's second-look doctrine in effect constitutes a limited wait-and-see doctrine, and is therefore subsumed under but not totally superseded by this Act. The following example, which is a variation of Example (18) above, illustrates how the second-look doctrine operates at common law and how the situation would be analyzed under this Act.

Example (21) — Second-look Case. G was the life income beneficiary of a trust and the donee of a nongeneral power of appointment over the succeeding remainder interest, exercisable in favor of G's descendants. The trust was created by the will of his mother, M, who predeceased him. G exercised his power by his will, directing the income to be paid after his death to his children for the life of the survivor, and upon the death of his last surviving child, to pay the corpus of the trust to his grandchildren. At M's death, G had two children, X and Y. No further children were born to G, and at his death X and Y were still living.

The common-law solution of this example is as follows: G's appointment is valid under the Common-law Rule. Although the period of the Rule begins to run at M's death, the facts existing at G's death can be taken into account. This second look at the facts discloses that G had no additional children. Thus the possibility of additional children, which existed at M's death when the period of the Rule began to run, is disregarded. The survivor of X and Y, therefore, becomes the validating life for the remainder interest in favor of G's grandchildren, and G's appointment is valid. The common-law's second-look doctrine would not, however, save G's appointment if he actually had one or more children after M's death and if at least one of these after-born children survived G.

Under this Act, if no additional children are born to G after M's death, the common-law second-look doctrine can be invoked as of G's death to declare G's appointment then to be valid under Section 1(a)(1); no further waiting is necessary. However, if additional children *are* born to G and one or more of them survives G, Section 1(a)(2) applies and the validity of G's appointment depends on G's last surviving child dying within 90 years after M's death.

Additional References. Restatement (Second) of Property (Donative Transfers) § 1.2, Comments d, f, g, and h; § 1.3, Comment g; § 1.4, Comment l (1983).

G. SECTION 1(e): EFFECT OF CERTAIN "LATER-OF" TYPE LANGUAGE; COORDINATION OF GENERATION-SKIPPING TRANSFER TAX REGULATIONS WITH UNIFORM ACT

Effect of Certain "Later-of" Type Language. Section 1(e) was added to the Uniform Act in 1990. It primarily applies to a non-traditional type of "later-of" clause (described below). Use of that type of clause might have produced unintended consequences, which are now rectified by the addition of Section 1(e).

In general, perpetuity saving or termination clauses can be used in either of two ways. The predominant use of such clauses is as an override clause. That is, the clause is not an integral part of the dispositive terms of the trust, but operates independently of the dispositive terms; the clause provides that all interests must vest no later than at a specified time in the future, and sometimes also provides that the trust must then terminate, but only if any interest has not previously vested or if the trust has not previously terminated. The other use of such a clause is as an integral part of the dispositive terms of the trust; that is, the clause is the provision that directly regulates the duration of the trust. Traditional perpetuity saving or termination clauses do not use a "later-of" approach; they mark off the maximum time of vesting or termination only by reference to a 21-year period following the death of the survivor of specified lives in being at the creation of the trust.

Section 1(e) applies to a non-traditional clause called a "later-of" (or "longer-of") clause. Such a clause might provide that the maximum time of vesting or termination of any interest or trust must occur no later than the later of (A) 21 years after the death of the survivor of specified lives in being at the creation of the trust or (B) 90 years after the creation of the trust.

Under the Uniform Act as originally promulgated, this type of "later-of" clause would not achieve a "later-of" result. If used as an override clause in conjunction with a trust whose terms were, by themselves, valid under the Common-law Rule, the "later-of" clause did no harm. The trust would be valid under the Common-law Rule as codified in Section 1(a)(1) because the clause itself would neither postpone the vesting of any interest nor extend the duration of the trust. But, if used either (1) as an override clause in conjunction with a trust whose terms were not valid under the Common-law Rule or (2) as the provision that directly regulated the duration of the trust, the "later-of" clause would not cure the perpetuity violation in case (1) and would create a perpetuity violation in case (2). In neither case would the clause qualify the trust for validity at common law under Section 1(a)(1) because the clause would not guarantee that all interests will be certain to vest or terminate no later than 21 years after the death of an individual then alive.** In any given case, 90 years can turn out to be longer than the period

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**By substantial analogous authority, the specified-lives-in-being-plus-21-years prong of the "later-of" clause under discussion is not sustained by the separability doctrine (described in Part H of the Comment to Section 1). See, e.g., Restatement of Property § 376 Comments e and f and illustration 3 (1944); Easton v. Hall, 323 Ill. 397, 154 N.E. 216 (1926); Thorne v. Continental Nat'l Bank & Trust Co., 305 Ill. App.

produced by the specified-lives-in-being-plus-21-years language.

Because the clause would fail to qualify the trust for validity under the Common-law Rule of Section 1(a)(1), the nonvested interests in the trust would be subject to the wait-and-see element of Section 1(a)(2) and vulnerable to a reformation suit under Section 3. Under Section 1(a)(2), an interest that is not valid at common law is invalid unless it actually vests or terminates within 90 years after its creation. Section 1(a)(2) does not grant such nonvested interests a permissible vesting period of either 90 years or a period of 21 years after the death of the survivor of specified lives in being. Section 1(a)(2) only grants such interests a period of 90 years in which to vest.

The operation of Section 1(a), as outlined above, is also supported by perpetuity policy. If Section 1(a) allowed a "later-of" clause to achieve a "later-of" result, it would authorize an improper use of the 90-year permissible vesting period of Section 1(a)(2). The 90-year period of Section 1(a)(2) is designed to approximate the period that, *on average,* would be produced by using actual lives in being plus 21 years. Because in any given case the period actually produced by lives in being plus 21 years can be shorter or longer than 90 years, an attempt to utilize a 90-year period in a "later-of" clause improperly seeks to turn the 90-year average into a minimum.

Set against this background, the addition of Section 1(e) is quite beneficial. Section 1(e) limits the effect of this type of "later-of" language to 21 years after the death of the survivor of the specified lives, in effect transforming the clause into a traditional perpetuity saving/termination clause. By doing so, Section 1(e) grants initial validity to the trust under the Common-law Rule as codified in Section 1(a)(1) and precludes a reformation suit under Section 3.

Note that Section 1(e) covers variations of the "later-of" clause described above, such as a clause that postpones vesting until the later of (A) 20 years after the death of the survivor of specified lives in being or (B) 89 years. Section 1(e) does not, however, apply to all dispositions that incorporate a "later-of" approach. To come under Section 1(e), the specified-lives prong must include a tack-on period of up to 21 years. Without a tack-on period, a "later-of" disposition, unless valid at common law, comes under Section 1(a)(2) and is given 90 years in which to vest. An example would be a disposition that creates an interest that is to vest upon "the later of the death of my widow or 30 years after my death."

Coordination of the Federal Generation-Skipping Transfer Tax with the Uniform Statutory Rule. In 1990, the Treasury Department announced a decision to coordinate the tax regulations under the "grandfathering" provisions of the federal generation-skipping transfer tax with the Uniform Act. Letter from Michael J. Graetz, Deputy Assistant Secretary of the Treasury (Tax Policy), to Lawrence J. Bugge, President, National Conference of Commissioners on Uniform State Laws (Nov. 16, 1990) (hereinafter *Treasury Letter*).

Section 1433(b)(2) of the Tax Reform Act of 1986 generally exempts ("grandfathers") trusts from the federal generation-skipping transfer tax that were irrevocable on September 25, 1985. This section adds, however, that the exemption shall apply "only to the extent that such transfer is not made out of corpus added to the trust after September 25, 1985." The provisions of Section 1433(b)(2) were first implemented by Temp. Treas. Reg. § 26.2601-1, promulgated by T.D. 8187 on March 14, 1988. Insofar as the Uniform Act is concerned, a key feature of that temporary regulation is the concept that the statutory reference to "corpus added to the trust after September 25, 1985" not only covers actual post-9/25/85 transfers of new property or corpus to a grandfathered trust but "constructive" additions as well. Under the temporary regulation as first promulgated, a "constructive" addition occurs if, after 9/25/85, the donee of a nongeneral power of appointment exercises that power "in a manner that may postpone or suspend the vesting, absolute ownership or power of alienation of an interest in property for a period, measured from the date of creation of the trust, extending beyond any life in being at the date of creation of the trust plus a period of 21 years. If a power is exercised by creating another power it will be deemed to be exercised to whatever extent the second power may be exercised." Temp. Treas. Reg. § 26.2601-1(b)(1)(v)(B)(2) (1988).

222, 27 N.E.2d 302 (1940). The inapplicability of the separability doctrine is also supported by perpetuity policy, as described in the text above.

Because the Uniform Act was promulgated in 1986 and applies only prospectively, any "grandfathered" trust would have become irrevocable prior to the enactment of the Uniform Act in any state. Nevertheless, the second sentence of Section 5(a) extends the wait-and-see approach to post-effective-date exercises of nongeneral powers even if the power itself was created prior to the effective date of the Uniform Act in any state. Consequently, a post-effective-date exercise of a nongeneral power of appointment created in a "grandfathered" trust could come under the provisions of the Uniform Act.

The literal wording, then, of Temp. Treas. Reg. § 26.2601-1(b)(1)(v)(B)(2) (1988), as first promulgated, could have jeopardized the grandfathered status of an exempt trust if (1) the trust created a nongeneral power of appointment, (2) the donee exercised that nongeneral power, and (3) the Uniform Act is the perpetuity law applicable to the donee's exercise. This possibility arose not only because the donee's exercise itself might come under the 90-year permissible vesting period of Section 1(a)(2) if it otherwise violated the Common-law Rule and hence was not validated under Section 1(a)(1). The possibility also arose in a less obvious way if the donee's exercise created another nongeneral power. The last sentence of the temporary regulation states that "if a power is exercised by creating another power it will be deemed to be exercised to whatever extent the second power may be exercised."

In late March 1990, the National Conference of Commissioners on Uniform State Laws (NCCUSL) filed a formal request with the Treasury Department asking that measures be taken to coordinate the regulation with the Uniform Act. By the Treasury Letter referred to above, the Treasury Department responded by stating that it "will amend the temporary regulations to accommodate the 90-year period under USRAP as originally promulgated [in 1986] or as amended [in 1990 by the addition of subsection (e)]." This should effectively remove the possibility of loss of grandfathered status under the Uniform Act merely because the donee of a nongeneral power created in a grandfathered trust inadvertently exercises that power in violation of the Common-law Rule or merely because the donee exercises that power by creating a second nongeneral power that might, in the future, be inadvertently exercised in violation of the Common-law Rule.

The Treasury Letter states, however, that any effort by the donee of a nongeneral power in a grandfathered trust to obtain a "later-of" specified-lives-in-being-plus-21-years or 90-years approach will be treated as a constructive addition, unless that effort is nullified by state law. As explained above, the Uniform Act, as originally promulgated in 1986 or as amended in 1990 by the addition of Section 1(e), nullifies any direct effort to obtain a "later-of" approach by the use of a "later-of" clause.

The Treasury Letter states that an indirect effort to obtain a "later-of" approach would also be treated as a constructive addition that would bring grandfathered status to an end, unless the attempt to obtain the later-of approach is nullified by state law. The Treasury Letter indicates that an indirect effort to obtain a "later-of" approach could arise if the donee of a nongeneral power successfully attempts to prolong the duration of a grandfathered trust by switching from a specified-lives-in-being-plus-21-years perpetuity period to a 90-year perpetuity period, or vice versa. Donees of nongeneral powers in grandfathered trusts would therefore be well advised to resist any temptation to wait until it becomes clear or reasonably predictable which perpetuity period will be longer and then make a switch to the longer period if the governing instrument creating the power utilized the shorter period. No such attempted switch and no constructive addition will occur if in each instance a traditional specified-lives-in-being-plus-21-years perpetuity saving clause is used.

Any such attempted switch is likely in any event to be nullified by state law and, if so, the attempted switch will not be treated as a constructive addition. For example, suppose that the original grandfathered trust contained a standard perpetuity saving clause declaring that all interests in the trust must vest no later than 21 years after the death of the survivor of specified lives in being. In exercising a nongeneral power created in that trust, any indirect effort by the donee to obtain a "later-of" approach by adopting a 90-year perpetuity saving clause will likely be nullified by Section 1(e). If that exercise occurs at a time when it has become clear or reasonably predictable that the 90-year period will prove longer, the donee's exercise would constitute language in a governing instrument that seeks to operate in effect to postpone the vesting of any interest until the later of the specified-lives-in-being-plus-21-years period or 90 years. Under Section 1(e), "that language is inoperative to the extent it produces a period of time that exceeds 21 years after the death of the survivor of the specified lives."

Quite apart from Section 1(e), the relation-back doctrine generally recognized in the exercise of nongeneral powers stands as a doctrine that could potentially be invoked to nullify an attempted switch from one perpetuity period to the other perpetuity period. Under that doctrine, interests created by the exercise of a nongeneral power are considered created by the donor of that power. See, e.g., Restatement (Second) of Property, Donative Transfers § 11.1 comment b (1986). As such, the maximum vesting period applicable to interests created by the exercise of a nongeneral power would apparently be covered by the perpetuity saving clause in the document that created the power, notwithstanding any different period the donee purports to adopt.

H. SUBSIDIARY COMMON-LAW DOCTRINES: WHETHER SUPERSEDED BY THIS ACT

As noted at the beginning of this Comment, the courts in interpreting the Common-law Rule developed several subsidiary doctrines. This Act does not supersede those subsidiary doctrines except to the extent the provisions of this Act conflict with them. As explained below, most of these common-law doctrines remain in full force or in force in modified form.

Constructional Preference for Validity. Professor Gray in his treatise on the Common-law Rule Against Perpetuities declared that a will or deed is to be construed without regard to the Rule, and then the Rule is to be "remorselessly" applied to the provisions so construed. J. Gray, The Rule Against Perpetuities § 629 (4th ed. 1942). Some courts may still adhere to this proposition. Colorado Nat'l Bank v. McCabe, 143 Colo. 21, 353 P.2d 385 (1960). Most courts, it is believed, would today be inclined to adopt the proposition put by the Restatement of Property § 375 (1944), which is that where an instrument is ambiguous — that is, where it is fairly susceptible to two or more constructions, one of which causes a Rule violation and the other of which does not — the construction that does not result in a Rule violation should be adopted. Cases supporting this view include Southern Bank & Trust Co. v. Brown, 271 S.C. 260, 246 S.E.2d 598 (1978); Davis v. Rossi, 326 Mo. 911, 34 S.W.2d 8 (1930); Watson v. Goldthwaite, 184 N.E.2d 340, 343 (Mass. 1962); Walker v. Bogle, 244 Ga. 439, 260 S.E.2d 338 (1979); Drach v. Ely, 703 P.2d 746 (Kan. 1985).

The constructional preference for validity is not superseded by this Act, but its role is likely to be different. The situation is likely to be that one of the constructions to which the ambiguous instrument is fairly susceptible would result in validity under Section 1(a)(1), 1(b)(1), or 1(c)(1), but the other construction does not necessarily result in invalidity; rather it results in the interest's validity being governed by Section 1(a)(2), 1(b)(2), or 1(c)(2). Nevertheless, even though the result of adopting the other construction is not as harsh as it is at common law, it is expected that the courts will incline toward the construction that validates the disposition under Section 1(a)(1), 1(b)(1), or 1(c)(1).

Conclusive Presumption of Lifetime Fertility. At common law, all individuals — regardless of age, sex, or physical condition — are *conclusively* presumed to be able to have children throughout their entire lifetimes. This principle is not superseded by this Act, and in view of new advances in medical science that allow women to become pregnant after menopause by way of test-tube fertilization (see Sauer, Paulson & Lobo, *A Preliminary Report on Oocyte Donation Extending Reproductive Potential to Women Over 40*, 323 N.Eng.J.Med. 1157 (1990)) and the widely accepted rule of construction that adopted children are presumptively included in class gifts, the conclusive presumption of lifetime fertility is not unrealistic. Since even elderly individuals probably cannot be excluded from adopting children based on their ages alone, the possibility of having children by adoption is seldom extinct. See, generally, Waggoner *In re Lattouf's Will and the Presumption of Lifetime Fertility in Perpetuity Law*, 20 San Diego L.Rev. 763 (1983). Under this Act, the main force of this principle is felt in Example (7), above, where it prevents a nonvested property interest from passing the test for initial validity under Section 1(a)(1).

Act Supersedes Doctrine of Infectious Invalidity. At common law, the invalidity of an interest can, under the doctrine of infectious invalidity, be held to invalidate one or more otherwise valid interests created by the disposition or even invalidate the entire disposition. The question turns on whether the general dispositive scheme of the transferor will be better carried out by eliminating only the invalid interest or by eliminating other interests as well. This is a question that is answered on a case-by-case basis. Several items are relevant to the question, including who takes the stricken interests in place of those the transferor designated to take.

The doctrine of infectious invalidity is superseded by this Act by Section 3, under which courts, upon the petition of an interested person, are required to *reform* the disposition to approximate as closely as possible the transferor's manifested plan of distribution when an invalidity under the Statutory Rule occurs.

Separability. The common law's separability doctrine is that when an interest is *expressly* subject to alternative contingencies, the situation is treated as if two interests were created in the same person or class. Each interest is judged separately; the invalidity of one of the interests does not necessarily cause the other one to be invalid. This common-law principle was established in Longhead v. Phelps, 2 Wm.Bl. 704, 96 Eng. Rep. 414 (K.B. 1770), and is followed in this country. L. Simes & A. Smith, The Law of Future Interests § 1257 (2d ed. 1956); 6 American Law of Property § 24.54 (A. Casner ed. 1952); Restatement of Property § 376 (1944). Under this doctrine, if property is devised "to B if X-event or Y-event happens," B in effect has two interests, one contingent on X-event happening and the other contingent on Y-event happening. If the interest contingent on X-event but not the one contingent on Y-event is invalid, the consequence of separating B's interest into two is that only one of them, the one contingent on X-event, is invalid. B still has a valid interest — the one contingent on the occurrence of Y-event.

The separability principle is not superseded by this Act. As illustrated in the following example, its invocation will usually result in one of the interests being initially validated by Section 1(a)(1) and the validity of the other interests being governed by Section 1(a)(2).

Example (22) — Separability Case. G devised real property "to A for life, then to A's children who survive A and reach 25, but if none of A's children survives A or if none of A's children who survives A reaches 25, then to B." G was survived by his brother (B), by his daughter (A), by A's husband (H), and by A's two minor children (X and Y).

The remainder interest in favor of A's children who reach 25 fails the test of Section 1(a)(1) for initial validity. Its validity is, therefore, governed by Section 1(a)(2) and depends on each of A's children doing any one of the following things within 90 years after G's death: predeceasing A, surviving A and failing to reach 25, or surviving A and reaching 25.

Under the separability doctrine, B has two interests. One of them is contingent on none of A's children surviving A. That interest passes Section 1(a)(1)'s test for initial validity; the validating life is A. B's other interest, which is contingent on none of A's surviving children reaching 25, fails Section 1(a)(1)'s test for initial validity. Its validity is governed by Section 1(a)(2) and depends on each of A's surviving children either reaching 25 or dying under 25 within 90 years after G's death.

Suppose that after G's death, A has a third child (Z). A subsequently dies, survived by her husband (H) and by X, Y, and Z. This, of course, causes B's interest that was contingent on none of A's children surviving A to terminate. If X, Y, and Z had all reached the age of 25 by the time of A's death, their interest would vest at A's death, and that would end the matter. If one or two, but not all three of them, had reached the age of 25 at A's death, B's other interest — the one that was contingent on none of A's surviving children reaching 25 — would also terminate. As for the children's interest, if the after- born child Z's age was such at A's death that Z could not be alive and under the age of 25 at the expiration of the allowable waiting period, the class gift in favor of the children would be valid under Section 1(a)(2), because none of those then under 25 could fail either to reach 25 or die under 25 after the expiration of the allowable 90-year waiting period. If, however, Z's age at A's death was such that Z could be alive and under the age of 25 at the expiration of the 90-year permissible vesting period, the circumstances requisite to reformation under Section 3(2) would arise, and the court would be justified in reforming G's disposition by reducing the age contingency with respect to Z to the age he would reach on the date when the permissible vesting period is due to expire. See Example (3) in the Comment to Section 3. So reformed, the class gift in favor of A's children could not become invalid under Section 1(a)(2), and the children of A who had already reached 25 by the time of A's death could receive their shares immediately.

The "All-or-Nothing" Rule with Respect to Class Gifts; the Specific Sum and Sub-Class Doctrines. The common law applies an "all-or-nothing" rule with respect to class gifts, under which a class gift stands or falls as a whole. The all-or-nothing rule, usually attributed to Leake v. Robinson, 2 Mer. 363, 35 Eng. Rep. 979 (Ch. 1817), is commonly stated as follows: If the interest of any potential class member *might* vest too remotely, the entire class gift violates the Rule. Although this Act does not supersede the basic idea of the much-maligned "all-or-nothing" rule, the evils sometimes attributed to it are substantially if not entirely eliminated by the wait-and-see feature of the Statutory Rule and by the availability of reformation under Section 3, especially in the circumstances described in Sections 3(2) and (3). For illustrations of the application of the all-or-nothing rule under this Act, see Examples (3), (4), and (6) in the Comment to Section 3.

The common law also recognizes a doctrine called the specific-sum doctrine, which is derived from Storrs v. Benbow, 3 De G.M. & G. 390, 43 Eng. Rep. 153 (Ch. 1853), and states: If a specified sum of money is to be paid to each member of a class, the interest of each class member is entitled to separate treatment and is valid or invalid under the Rule on its own. The common law also recognizes a doctrine called the sub-class doctrine, which is derived from Cattlin v. Brown, 11 Hare 372, 68 Eng. Rep. 1318 (Ch. 1853), and states: If the ultimate takers are not described as a single class but rather as a group of subclasses, and if the share to which each separate subclass is entitled will finally be determined within the period of the Rule, the gifts to the different subclasses are separable for the purpose of the Rule. American Security & Trust Co. v. Cramer, 175 F.Supp. 367 (D.D.C. 1959); Restatement of Property § 389 (1944). The specific-sum and sub-class doctrines are not superseded by this Act. The operation of the specific-sum doctrine under this Act is illustrated in the following example.

Example (23) — Specific-Sum Case. G bequeathed "$10,000 to each child of A, born before or after my death, who attains 25." G was survived by A and by A's two children (X and Y). X but not Y had already reached 25 at G's death. After G's death a third child (Z) was born to A.

If the phrase "born before or after my death" had been omitted, the class would close as of G's death under the common-law's rule of construction known as the rule of convenience: The after-born child, Z, would not be entitled to a $10,000 bequest, and the interests of both X and Y would be valid upon their creation at G's death. X's interest would be valid because it was initially vested; neither the Common-law Rule nor the Statutory Rule applies to interests that are vested upon their creation. Although the interest of Y was not vested upon its creation, it would be initially valid under Section 1(a)(1) because Y would be his own validating life; Y will either reach 25 or die under 25 within his own lifetime.

The inclusion of the phrase "before or after my death," however, would probably be construed to mean that G intended after-born children to receive a $10,000 bequest. See *Earle Estate*, 369 Pa. 52, 85 A.2d 90 (1951). Assuming that this construction were adopted, the specific-sum doctrine allows the interest of each child of A to be treated separately from the others for purposes of the Statutory Rule. For the reasons cited above, the interests of X and Y are initially valid under Section 1(a)(1). The nonvested interest of Z, however, fails Section 1(a)(1)'s test for initial validity; there is no validating life because Z, who was not alive when the interest was created, could reach 25 or die under 25 more than 21 years after the death of the survivor of A, X, and Y. Under Section 1(a)(2), the validity of Z's interest depends on Z's reaching (or failing to reach) 25 within 90 years after G's death.

The operation of the sub-class doctrine under this Act is illustrated in the following example.

Example (24) — Sub-Class Case. G devised property in trust, directing the trustee to pay the income "to A for life, then in equal shares to A's children for their respective lives; on the death of each child, the proportionate share of corpus of the one so dying shall go to the children of such child." G was survived by A and by A's two children (X and Y). After G's death, another child

(Z) was born to A. A now has died, survived by X, Y, and Z.

Under the sub-class doctrine, each remainder interest in favor of the children of a child of A is treated separately from the others. This allows the remainder interest in favor of X's children and the remainder interest in favor of Y's children to be validated under Section 1(a)(1). X is the validating life for the one, and Y is the validating life for the other.

The remainder interest in favor of the children of Z fails Section 1(a)(1)'s test for initial validity; there is no validating life because Z, who was not alive when the interest was created, could have children more than 21 years after the death of the survivor of A, X, and Y. Under Section 1(a)(2), the validity of the remainder interest in favor of Z's children depends on Z's dying within 90 years after G's death.

Note why both of the requirements of the sub-class rule are met. The ultimate takers are described as a group of sub-classes rather than as a single class: "children of the child so dying," as opposed to "grandchildren." The share to which each separate sub-class is entitled is certain to be finally determined within a life in being plus 21 years: As of A's death, who is a life in being, it is certain to be known how many children he had surviving him; since in fact there were three, we know that each sub-class will ultimately be entitled to one-third of the corpus, neither more nor less. The possible failure of the one-third share of Z's children does not increase to one-half the share going to X's and Y's children; they still are entitled to only one-third shares. Indeed, should it turn out that X has children but Y does not, this would not increase the one-third share to which X's children are entitled.

Example (25) — General Testamentary Powers — Sub-Class Case. G devised property in trust, directing the trustee to pay income "to A for life, then in equal shares to A's children for their respective lives; on the death of each child, the proportionate share of corpus of the one so dying shall go to such persons as the one so dying shall by will appoint; in default of appointment, to G's grandchildren in equal shares." G was survived by A and by A's two children (X and Y). After G's death, another child (Z) was born to A.

The general testamentary powers conferred on each of A's children are entitled to separate treatment under the principles of the sub-class doctrine. See above. Consequently, the powers conferred on X and Y, A's children who were living at G's death, are initially valid under Section 1(c)(1). But the general testamentary power conferred on Z, A's child who was born after G's death, fails the test of Section 1(c)(1) for *initial* validity. The validity of Z's power is governed by Section 1(c)(2). Z's death must occur within 90 years after G's death if any provision in Z's will purporting to exercise his power is to be valid.

Duration of Indestructible Trusts — Termination of Trusts by Beneficiaries. The widely accepted view in American law is that the beneficiaries of a trust other than a charitable trust can compel its premature termination if all beneficiaries consent *and* if such termination is not expressly restrained or impliedly restrained by the existence of a "material purpose" of the settlor in establishing the trust. Restatement (Second) of Trusts § 337 (1959); IV A. Scott, The Law of Trusts § 337 (3d ed. 1967). A trust that cannot be terminated by its beneficiaries is called an indestructible trust.

It is generally accepted that the duration of the indestructibility of a trust, other than a charitable trust, is limited to the applicable perpetuity period. See Restatement (Second) of Trusts § 62, Comment o (1959); Restatement (Second) of Property (Donative Transfers) § 2.1 and Legislative Note and Reporter's Note (1983); I A. Scott, The Law of Trusts § 62.10(2) (3d ed. 1967); J. Gray, The Rule Against Perpetuities § 121 (4th ed. 1942); L. Simes & A. Smith, The Law of Future Interests §§ 1391-93 (2d ed. 1956).

Nothing in this Act supersedes this principle. One modification, however, is necessary: As to trusts that contain a nonvested property interest or power of appointment whose validity is governed by the wait-and-see element adopted in Section 1(a)(2), 1(b)(2), or 1(c)(2), the courts can be expected to determine that the applicable perpetuity period is 90 years.

Editor's Note. — Session Laws 1995, c. 190, s. 5, made this Article effective October 1, 1995.

§ 41-16. When nonvested property interest or power of appointment created.

(a) Except as provided in subsections (b) and (c) of this section and in G.S. 41-19(a), the time for creation of a nonvested property interest or a power of appointment is determined under general principles of property law.

(b) For purposes of this Article, if there is a person who alone can exercise a power created by a governing instrument to become the unqualified beneficial owner of (i) a nonvested property interest or (ii) a property interest subject to a power of appointment described in G.S. 41-15(b) or (c), the nonvested property interest or power of appointment is created when the power to become the unqualified beneficial owner terminates.

(c) For purposes of this Article, a nonvested property interest or a power of appointment arising from a transfer of property to a previously funded trust or other existing property arrangement is created when the nonvested property interest or power of appointment in the original contribution was created. (1995, c. 190, s. 1.)

OFFICIAL COMMENT

Subsection (a): General Principles of Property Law; When Nonvested Property Interests and Powers of Appointment are Created. Under Section 1, the period of time allowed by the Statutory Rule Against Perpetuities is marked off from the time of creation of the nonvested property interest or power of appointment in question. Section 5, with certain exceptions, provides that the Act applies only to nonvested property interests and powers of appointment created on or after the effective date of the Act.

Except as provided in subsections (b) and (c), and in the second sentence of Section 5(a) for purposes of that section only, the time of creation of nonvested property interests and powers of appointment is determined under general principles of property law.

Since a will becomes effective as a dispositive instrument upon the decedent's death, not upon the execution of the will, general principles of property law determine that the time when a nonvested property interest or a power of appointment created by will is created is at the decedent's death.

With respect to a nonvested property interest or a power of appointment created by inter vivos transfer, the time when the interest or power is created is the date the transfer becomes effective for purposes of property law generally, normally the date of delivery of the deed.

With respect to a nonvested property interest or a power of appointment created by the testamentary or inter vivos exercise of a power of appointment, general principles of property law adopt the "relation back" doctrine. Under that doctrine, the appointed interests or powers are created when the power was *created* not when it was exercised, if the exercised power was a nongeneral power or a general testamentary power. If the exercised power was a general power presently exercisable, the relation back doctrine is not followed; the time of creation of the appointed property interests or appointed powers is regarded as the time when the power was irrevocably *exercised*, not when the power was created.

Subsection (b): Postponement, for Purposes of this Act, of the Time when a Nonvested Property Interest or a Power of Appointment is Created in Certain Cases. The reason that the significant date for purposes of this Act is the date of creation is that the unilateral control of the interest (or the interest subject to the power) by one person is then relinquished. In certain cases, all beneficial rights in a property interest (including an interest subject to a power of appointment) remain under the unilateral control of one person even after the delivery of the deed or even after the decedent's death. In such cases, under this subsection, the interest or power is created, for purposes of this Act, when no person, acting alone, has a power presently exercisable to become the unqualified beneficial owner of the property interest (or the property interest subject to the power of appointment).

Example (1) — Revocable Inter-Vivos Trust Case. G conveyed property to a trustee, directing the trustee to pay the net income therefrom to himself (G) for life, then to G's son A for his life, then to A's children for the life of the survivor of A's children who are living at G's death, and upon the death of such last surviving child, the corpus of the trust is to be distributed among A's then-living descendants, per stirpes. G retained the power to revoke the trust. Because of G's reservation of the power to revoke the trust, the creation for purposes of this Act of the nonvested property interests in this case occurs at G's death, not when the trust was established. This is in accordance with common law, for purposes of the Common-law Rule Against Perpetuities. Cook v. Horn, 214 Ga. 289, 104 S.E.2d 461 (1958).

The rationale that justifies the postponement of the time of creation in such cases is as follows. A person, such as G in the above example, who alone can exercise a power to become the unqualified beneficial owner of a nonvested property interest is in effect the owner of that property interest. Thus, any nonvested property interest subject to such a power is not created for purposes of this Act until the power terminates (by release, expiration at the death of the donee, or otherwise). Similarly, as noted above, any property interest or power of appointment created in an appointee by the irrevocable exercise of such a power is created at the time of the donee's irrevocable exercise.

For the date of creation to be postponed under subsection (b), the power need not be a power to revoke, and it need not be held by the settlor or transferor. A *presently exercisable* power held by *any* person *acting alone* to make himself the unqualified beneficial owner of the nonvested property interest or the property interest subject to a power of appointment is sufficient. If such a power exists, the time when the interest or power is created, for purposes of this Act, is postponed until the termination of the power (by irrevocable exercise, release, contract to exercise or not to exercise, expiration at the death of the donee, or otherwise). An example of such a power that might not be held by the settlor or transferor is a power, held by any person who can act alone, fully to invade the corpus of a trust.

An important consequence of the idea that a power need not be held by the settlor for the time of creation to be postponed under this section is that it makes postponement possible even in cases of testamentary transfers.

Example (2) — Testamentary Trust Case. G devised property in trust, directing the trustee to pay the income "to A for life, remainder to such persons (including A, his creditors, his estate, and the creditors of his estate) as A shall appoint; in default of appointment, the property to remain in trust to pay the income to A's children for the life of the survivor, and upon the death of A's last surviving child, to pay the corpus to A's grandchildren." A survived G.

If A exercises his presently exercisable general power, any nonvested property interest or power of appointment created by A's appointment is created for purposes of this Act when the power is exercised. If A does not exercise the power, the nonvested property interests in G's gift-in-default clause are created when A's power terminates (at A's death). In either case, the postponement is justified because the transaction is the equivalent of G's having devised the full remainder interest (following A's income interest) to A and of A's having in turn transferred that interest in accordance with his exercise of the power or, in the event the power is not exercised, devised that interest at his death in accordance with G's gift-in-default clause. Note, however, that if G had conferred on A a *nongeneral* power or a general *testamentary* power, A's power of appointment, any nonvested property interest or power of appointment created by A's appointment, if any, and the nonvested property interests in G's gift-in-default clause would be created at G's death.

Unqualified Beneficial Owner of the Nonvested Property Interest or the Property Interest Subject to a Power of Appointment. For the date of creation to be postponed under subsection (b), the presently exercisable power must be one that entitles the donee of the power to become the unqualified beneficial owner of the *nonvested property interest (or the prop-*

erty interest subject to a nongeneral power of appointment, a general testamentary power of appointment, or a general power of appointment not presently exercisable because of a condition precedent). This requirement was met in Example (2), above, because A could by appointing the remainder interest to himself become the unqualified beneficial owner of all the nonvested property interests in G's gift-in-default clause. In Example (2) it is not revealed whether A, if he exercised the power in his own favor, also had the right as sole beneficiary of the trust to compel the termination of the trust and possess himself as unqualified beneficial owner of the property that was the subject of the trust. Having the power to compel termination of the trust is not necessary. If, for example, the trust in Example (2) was a spendthrift trust or contained any other feature that under the relevant local law (see Claflin v. Claflin, 149 Mass. 19, 20 N.E. 454 (1889); Restatement (Second) of Trusts § 337 (1959)) would prevent A as sole beneficiary from compelling termination of the trust, A's presently exercisable general power over the remainder interest would still postpone the time of creation of the nonvested property interests in G's gift-in-default clause because the power enables A to become the unqualified beneficial owner of such interests.

Furthermore, it is not necessary that the donee of the power have the power to become the unqualified beneficial owner of *all beneficial* rights *in the trust.* In Example (2), the property interests in G's gift-in-default clause are not created for purposes of this Act until A's power expires (or on A's appointment, until the power's exercise) even if someone other than A was the income beneficiary of the trust.

Presently Exercisable Power. For the date of creation to be postponed under subsection (b), the power must be presently exercisable. A testamentary power does not qualify. A power not presently exercisable because of a condition precedent does not qualify. If the condition precedent later becomes satisfied, however, so that the power becomes presently exercisable, the interests or powers subject thereto are not created, for purposes of this Act, until the termination of the power. The common-law decision of Fitzpatrick v. Mercantile Safe Deposit Co., 220 Md. 534, 155 A.2d 702 (1959), appears to be in accord with this proposition.

Example (3) — General Power in Unborn Child Case. G devised property "to A for life, then to A's first-born child for life, then to such persons, including A's first-born child or such child's estate or creditors, as A's first-born child shall appoint." There was a further provision that in default of appointment, the trust would continue for the benefit of G's descendants. G was survived by his daughter (A), who was then childless. After G's death, A had a child, X. A then died, survived by X.

As of G's death, the power of appointment in favor of A's first-born child and the property interests in G's gift-in-default clause would be regarded as having been created at G's death because the power in A's first-born child was then a general power not presently exercisable because of a condition precedent.

At X's birth, X's general power became presently exercisable and excluded from the Statutory Rule. X's power also qualifies as a power exercisable by one person alone to become the unqualified beneficial owner of the property interests in G's gift-in-default clause. Consequently, the nonvested property interests in G's gift-in-default clause are not created, for purposes of this Act, until the termination of X's power. If X exercises his presently exercisable general power, before or after A's death, the appointed interests or powers are created, for purposes of this Act, as of X's exercise of the power.

Partial Powers. For the date of creation to be postponed under subsection (b), the person must have a presently exercisable power to become the unqualified beneficial owner of the full nonvested property interest or the property interest subject to a power of appointment described in Section 1(b) or 1(c). If, for example, the subject of the transfer was an undivided interest such as a one-third tenancy in common, the power qualifies even though it relates only to the undivided one-third interest in the tenancy in common; it need not relate to the whole property. A power to become the unqualified beneficial owner of only part of the nonvested property interest or the property interest subject to a power of appointment, however, does not postpone the time of creation of the interests or powers subject thereto, unless the power is actually exercised.

Example (4) — "5 and 5" Power Case. G devised property in trust, directing the trustee to pay the income "to A for life, remainder to such persons (including A, his creditors, his estate, and the creditors of his estate) as A shall by will appoint;" in default of appointment, the governing instrument provided for the property to continue in trust. A was given a noncumulative power to withdraw the greater of $5,000 or 5% of the corpus of the trust annually. A survived G. A never exercised his noncumulative power of withdrawal.

G's death marks the time of creation of: A's testamentary power of appointment; any nonvested property interest or power of appointment created in G's gift-in-default clause; and any appointed interest or power created by a testamentary exercise of A's power of appointment over the remainder interest. A's general power of appointment over the remainder interest does not postpone the time of creation because it is not a presently exercisable power. A's noncumulative power to withdraw a portion of the trust each year does not postpone the time of creation as to all or the portion of the trust with respect to which A allowed his power to lapse each year because A's power is a power over only part of any nonvested property interest or property interest subject to a power of appointment in G's gift-in-default clause and over only part of any appointed interest or power created by a testamentary exercise of A's general power of appointment over the remainder interest. The same conclusion has been reached at common law. See Ryan v. Ward, 192 Md. 342, 64 A.2d 258 (1949).

If, however, in any year A exercised his noncumulative power of withdrawal in a way that created a nonvested property interest (or power of appointment) in the withdrawn amount (for example, if A directed the trustee to transfer the amount withdrawn directly into a trust created by A), the appointed interests (or powers) would be created when the power was exercised, not when G died.

Incapacity of the Donee of the Power. The fact that the donee of a power lacks the capacity to exercise it, by reason of minority, mental incompetency, or any other reason, does not prevent the power held by such person from postponing the time of creation under subsection (b), unless the governing instrument extinguishes the power (or prevents it from coming into existence) for that reason.

Joint Powers — Community Property; Marital Property. For the date of creation to be postponed under subsection (b), the power must be exercisable by one person alone. A joint power does not qualify, except that, if the bracketed sentence of subsection (b) is enacted, a joint power over community property or over marital property under the Uniform Marital Property Act held by individuals married to each other is, for purposes of this Act, treated as a power exercisable by one person acting alone. See Restatement (Second) of Property (Donative Transfers) § 1.2, Comment b and illustrations 5, 6, and 7 (1983), for the rationale supporting the enactment of the bracketed sentence and examples illustrating its principle.

Subsection (c): No Staggered Periods. For purposes of this Act, subsection (c) in effect treats a transfer of property to a previously funded trust or other existing property arrangement as having been made when the nonvested property interest or power of appointment in the original contribution was created. The purpose of subsection (c) is to avoid the administrative difficulties that would otherwise result where subsequent transfers are made to an existing irrevocable trust. Without subsection (c), the allowable period under the Statutory Rule would be marked off in such cases from different times with respect to different portions of the same trust.

Example (5) — Series of Transfers Case. In Year One, G created an irrevocable inter vivos trust, funding it with $20,000 cash. In Year Five, when the value of the investments in which the original $20,000 contribution was placed had risen to a value of $30,000, G added $10,000 cash to the trust. G died in Year Ten. G's will poured the residuary of his estate into the trust. G's residuary estate consisted of Blackacre (worth $20,000) and securities (worth $80,000). At G's death, the value of the investments in which the original $20,000 contribution and the subsequent $10,000 contribution were placed had risen to a value of $50,000. Were it not for subsection (c), the permissible vesting period under the Statutory Rule would be marked off from three different times: Year One, Year Five, and Year Ten. The effect of subsection (c) is that the permissible vesting period under the Statutory Rule starts running only once — in Year One — with respect to the entire trust. This result is defensible not only to prevent the administrative difficulties inherent in recognizing staggered periods. It also is defensible because if G's inter vivos trust had contained a perpetuity saving clause, the perpetuity-period component of the clause would be geared to the time when the original contribution to the trust was made; this clause would cover the subsequent contributions as well. Since the major justification for the adoption by this Act of the wait-and-see method of perpetuity reform is that it amounts to a statutory insertion of a saving clause (see the Prefatory Note), subsection (c) is consistent with the theory of this Act.

Additional References. Restatement (Second) of Property (Donative Transfers) §§ 1.1, 1.2 (1983) and the Comments thereto.

§ 41-17. Reformation.

Upon the petition of an interested person, a court shall reform a disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the 90 years allowed by G.S. 41-15(a)(2), 41-15(b)(2), or 41-15(c)(2) if:

(1) A nonvested property interest or a power of appointment becomes invalid under G.S. 41-15;

(2) A class gift is not invalid under G.S. 41-15, but might become invalid under G.S. 41-15, and the time has arrived when the share of any class is to take effect in possession or enjoyment; or

(3) A nonvested property interest that is not validated by G.S. 41-15(a)(1) can vest but not within 90 years after its creation. (1995, c. 190, s. 1.)

OFFICIAL COMMENT

Reformation. This section requires a court, upon the petition of an interested person, to reform a disposition *whose validity is governed by the wait-and-see element of Section 1(a)(2), 1(b)(2), or 1(c)(2)* so that the reformed disposition is within the limits of the 90-year period allowed by those subsections, in the manner deemed by the court most closely to approximate the transferor's manifested plan of distribution, in three circumstances: First, when (after the application of the Statutory Rule) a nonvested property interest or a power of appointment becomes invalid under the Statutory Rule; second, when a class gift has not but still might become invalid under the Statutory Rule and the time has arrived when the share of one or more class members is to take effect in possession or enjoyment; and third, when a nonvested property interest can vest, but cannot do so within the allowable 90-year period under the Statutory Rule.

It is anticipated that the circumstances requisite to reformation will seldom arise, and consequently that this section will be applied infrequently. If, however, one of the three circumstances arises, the court in reforming is authorized to alter existing interests or powers and to create new interests or powers by implication or construction based on the transferor's manifested plan of distribution as a whole. In reforming, the court is urged not to invalidate any vested interest retroactively (the doctrine of infectious invalidity having been superseded by this Act, as indicated in the Comment to Section 1). The court is also urged not to reduce an age contingency in excess of 21 unless it is absolutely necessary, and if it is deemed necessary to reduce such an age contingency, not to reduce it automatically to 21 but rather to reduce it no lower than absolutely necessary. See Example (3), below; Waggoner, *Perpetuity Reform*, 81 Mich.L.Rev. 1718, 1755-1759 (1983); Langbein & Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U.Pa.L.Rev. 521, 546-49 (1982).

Judicial Sale of Land Affected by Future Interests. Although this section — except for cases that fall under subsections (2) or (3) — defers the time when a court is directed to reform a disposition until the expiration of the 90-year permissible vesting period, this section is not to be understood as preventing an earlier application of other remedies. In particular, in the case of interests in land not in trust, the principle, codified in many states, is widely recognized that there is judicial authority, under specified circumstances, to order a sale of land in which there are future interests. See 1 American Law of Property §§ 4.98-.99 (A. Casner ed. 1952); L. Simes & A. Smith, The Law of Future Interests §§ 1941-1946 (2d ed. 1956); see also Restatement of Property § 179 at pp. 485-95 (1936); L. Simes & C. Taylor, Improvement of Conveyancing by Legislation 235-38 (1960). Nothing in Section 3 of this Act should be taken as precluding this type of remedy, if appropriate, before the expiration of the 90-year permissible vesting period.

Duration of the Indestructibility of Trusts — Termination of Trusts by Beneficiaries. As noted in Part G of the Comment to Section 1, it is generally accepted that a trust cannot remain indestructible beyond the period of the rule against perpetuities. Under this Act, the period of the rule against perpetuities applicable to a trust whose validity is governed by the wait-and-see element of Section 1(a)(2), 1(b)(2), or 1(c)(2) is 90 years. The result of any reformation under Section 3 is that all nonvested property interests in the trust will vest in interest (or terminate) no later than the 90th anniversary of their creation. In the case of trusts containing a nonvested property interest or a power of appointment whose validity is governed by Section 1(a)(2), 1(b)(2), or 1(c)(2), courts can therefore be expected to adopt the rule that no purpose of the settlor, expressed in or implied from the governing instrument, can prevent the beneficiaries of a trust other than a charitable trust from compelling its termination after 90 years after every nonvested property interest and power of appointment in the trust was created.

Subsection (1): Invalid Property Interest or Power of Appointment. Subsection (1) is illustrated by the following examples.

Example (1) — Multiple Generation Trust. G devised property in trust, directing the trustee to pay the income "to A for life, then to A's children for the life of the survivor, then to A's grandchildren for the life of the survivor, and on the death of A's last surviving grandchild, the corpus of the trust is to be divided among A's then living descendants per stirpes; if none, to" a specified charity. G was survived by his child (A) and by A's two minor children (X and Y). After G's death, another child (Z) was born to A. Subsequently, A died, survived by his children (X, Y, and Z) and by three grandchildren (M, N, and O).

There are four interests subject to the Statutory Rule in this example: (1) the income interest in favor of A's children, (2) the income interest in favor of A's grandchildren, (3) the remainder interest in the corpus in favor of A's descendants who survive the death of A's last surviving grandchild, and (4) the alternative remainder interest in the corpus in favor of the specified charity. The first interest is initially valid under Section 1(a)(1); A is the validating life for that interest. There is no validating life for the other three interests, and so their validity is governed by Section 1(a)(2).

If, as is likely, A and A's children all die before the 90th anniversary of G's death, the income interest in favor of A's grandchildren is valid under Section 1(a)(2).

If, as is also likely, some of A's grandchildren are alive on the 90th anniversary of G's death, the alternative remainder interests in the corpus of the trust then become invalid under Section 1(a)(2), giving rise to Section 3(1)'s prerequisite to reformation. A court would be justified in reforming G's disposition by closing the class in favor of A's descendants as of the 90th anniversary of G's death (precluding new entrants thereafter), by moving back the condition of survivorship on the class so that the remainder interest is in favor of G's descendants who survive the 90th anniversary of G's death (rather than in favor of those who survive the death of A's last surviving grandchild), and by redefining the class so that its makeup is formed as if A's last surviving grandchild died on the 90th anniversary of G's death.

Example (2) — Sub-Class Case. G devised property in trust, directing the trustee to pay the income "to A for life, then in equal shares to A's children for their respective lives; on the death of each child the proportionate share of corpus of the one so dying shall go to the descendants of such child surviving at such child's death, per stirpes." G was survived by A and by A's two children (X and Y). After G's death, another child (Z) was born to A. Subsequently, A died, survived by X, Y, and Z.

Under the sub-class doctrine, each remainder interest in favor of the descendants of a child of A is treated separately from the others. Consequently, the remainder interest in favor of X's descendants and the remainder interest in favor of Y's descendants are valid under Section 1(a)(1): X is the validating life for the one, and Y is the validating life for the other.

The remainder interest in favor of the descendants of Z is not validated by Section 1(a)(1) because Z, who was not alive when the interest was created, could have descendants more than 21 years after the death of the survivor of A, X, and Y. Instead, the validity of the remainder interest in favor of Z's descendants is governed by Section 1(a)(2), under which its validity depends on Z's dying within 90 years after G's death.

Although unlikely, suppose that Z is still living 90 years after G's death. The remainder interest in favor of Z's descendants will then become invalid under the Statutory Rule, giving rise to subsection (1)'s prerequisite to reformation. In such circumstances, a court would be justified in reforming the remainder interest in favor of Z's descendants by making it indefeasibly vested as of the 90th anniversary of G's death. To do this, the court would reform the disposition by eliminating the condition of survivorship of Z and closing the class to new entrants after the 90th anniversary of G's death.

Subsection (2): Class Gifts Not Yet Invalid. Subsection (2), which, upon the petition of an interested person, requires reformation in certain cases where a class gift has not but still might become invalid under the Statutory Rule, is illustrated by the following examples.

Example (3) — Age Contingency in Excess of 21. G devised property in trust, directing the trustee to pay the income "to A for life, then to A's children; the corpus of the trust is to be equally divided among A's children who reach the age of 30." G was survived by A, by A's spouse (H), and by A's two children (X and Y), both of whom were under the age of 30 when G died. Since the remainder interest in favor of A's children who reach 30 is a class gift, at common law (Leake v. Robinson, 2 Mer. 363, 35 Eng. Rep. 979 (Ch. 1817)) and under this Act (see Part G of the Comment to Section 1) the interests of *all* potential class members must be valid or the class gift is totally invalid. Although X and Y will either reach 30 or die under 30 within their own lifetimes, there is at G's death the possibility that A will have an afterborn child (Z) who will reach 30 or die under 30 more than 21 years after the death of the survivor of A, H, X, and Y. There is no validating life, and the class gift is therefore not validated by Section 1(a)(1).

Under Section 1(a)(2), the children's remainder interest becomes invalid only if an interest of a class member neither vests nor terminates within 90 years after G's death. If in fact there is an afterborn child (Z), and if upon A's death, Z has at least reached an age such that he cannot be alive and under the age of 30 on the 90th anniversary of G's death, the class gift is valid. (Note that at Z's *birth* it would have been known whether or not Z could be alive and under the age of 30 on the 90th anniversary of G's death; nevertheless, even if it was *then* certain that Z could *not* be alive and under the age of 30 on the 90th anniversary of G's death, the class gift could not *then* have been declared valid because, A being alive, it was *then* possible for one or more additional children to have later been born to or adopted by A.)

Although unlikely, suppose that at A's death (prior to the expiration of the 90-year period), Z's age was such that he *could* be alive and under the age of 30 on the 90th anniversary of G's death. Suppose further that at A's death X and Y were over the age of 30. Z's interest and hence the class gift as a whole is not yet invalid under the Statutory Rule because Z might die under the age of 30 within the remaining part of the 90-year period following G's death; but the class gift might become invalid because Z might be alive and under the age of 30, 90 years after G's death. Consequently, the prerequisites to reformation set forth in subsection (2) are satisfied, and a court would be justified in reforming G's disposition to provide that Z's interest is contingent on reaching the age he can reach if he lives to the 90th anniversary of G's death. This would render Z's interest valid so far as the Statutory Rule Against Perpetuities is concerned, and allow the class gift as a whole to be declared valid. X and Y would thus be entitled immediately to their one-third shares each. If Z's interest later vested, Z would receive the remaining one-third share. If Z failed to reach the required age under the reformed disposition, the remaining one-third share would be divided equally between X and Y or their successors in interest.

Example (4) — Case Where Subsection (2) Applies, Not Involving an Age Contingency in Excess of 21. G devised property in trust, directing the trustee to pay the income "to A for life, then to A's children; the corpus of the trust is to be equally divided among A's children who graduate from an accredited medical school or law school." G was survived by A, by A's spouse (H), and by A's two minor children (X and Y).

As in Example (3), the remainder interest in favor of A's children is a class gift, and the common-law principle is not superseded by this Act by which the interests of *all* potential class members must be valid or the class gift is totally invalid. Although X and Y will either graduate from an accredited medical or law school, or fail to do so, within their own lifetimes, there is at G's death the possibility that A will have an after-born child (Z), who will graduate from an accredited medical or law school (or die without having done either) more than 21 years after the death of the survivor of A, H, X, and Y. The class gift would not be valid under the Common-law Rule and is, therefore, not validated by Section 1(a)(1).

Under Section 1(a)(2), the children's remainder interest becomes invalid only if an interest of a class member neither vests nor terminates within 90 years after G's death.

Suppose in fact that there is an afterborn child (Z), and that at A's death Z was a freshman in college. Suppose further that at A's death X had graduated from an accredited law school and that Y had graduated from an accredited medical school. Z's interest and hence the class gift as a whole is not yet invalid under Section 1(a)(2) because the 90-year period following G's death has not yet expired; but the class gift might become invalid because Z might be alive but not a graduate of an accredited medical or law school 90 years after G's death. Consequently, the prerequisites to reformation set forth in Section 3(2) are satisfied, and a court would be justified in reforming G's disposition to provide that Z's interest is contingent on graduating from an accredited medical or law school within 90 years after G's death. This would render Z's interest valid so far as the Section 1(a)(2) is concerned and allow the class gift as a whole to be declared valid. X and Y would thus be entitled immediately to their one-third shares each. If Z's interest later vested, Z would receive the remaining one-third share. If Z failed to graduate from an accredited medical or law school within the allowed time under the disposition as so reformed, the remaining one-third share would be divided equally between X and Y or their successors in interest.

Subsection (3): Interests that Can Vest But Not Within the 90-Year Permissible Vesting Period. In exceedingly rare cases, an interest might be created that can vest, but not within the 90-year permissible vesting period of the Statutory Rule. This may be the situation when the interest was created (See Example (5)), or it may become the situation at some time thereafter (see Example (6)). Whenever the situation occurs, the court, upon the petition of an interested person, is required by subsection (3) to reform the disposition within the limits of the 90-year permissible vesting period.

Example (5) — Case of an Interest, as of its Creation, being Impossible to Vest Within the 90-Year Period. G devised property in trust, directing the trustee to divide the income, per stirpes, among G's descendants from time to time living, for 100 years. At the end of the 100-year period following G's death, the trustee is to distribute the corpus and accumulated income to G's then-living descendants, per stirpes; if none, to the XYZ Charity.

The nonvested property interest in favor of G's descendants who are living 100 years after G's death can vest, but not within the 90-year period of Section 1(a)(2). The interest would violate the Common-law Rule, and hence is not validated by Section 1(a)(1), because there is no validating life. In these circumstances, a court is required by Section 3(3) to reform G's disposition within the limits of the 90-year period. An appropriate result would be for the court to lower the period following G's death from a 100-year period to a 90-year period.

Note that the circumstance that triggers the direction to reform the disposition under this subsection is that the nonvested property interest still can vest, but cannot vest within the 90-year period of Section 1(a)(2). It is not necessary that the interest be certain to become *invalid* under that subsection. For the interest to be certain to become invalid under Section 1(a)(2), it would have to be certain that it can neither vest *nor terminate* within the 90-year period. In this example, the interest of G's descendants might *terminate* within the period (by all of G's descendants dying within 90 years of G's death). If this were to happen, the interest of XYZ Charity would be valid because it would have vested within the allowable period. However, it was thought desirable to require reformation without waiting to see if this would happen: The only way that G's *descendants*, who are G's *primary* set of beneficiaries, would have a chance to take the property is to reform the disposition within the limits of the 90-year period on the ground that their interest cannot *vest* within the allowable period and subsection (3) so provides.

Example (6) — Case of an Interest after its Creation Becoming Impossible to Vest Within the 90-Year Period. G devised property in trust, with the income to be paid to A. The corpus of the trust was to be divided among A's children who reach 30, each child's share to be paid on the child's 30th birthday; if none reaches 30, to the XYZ Charity. G was survived by A and by A's two children (X and Y). Neither X nor Y had reached 30 at G's death.

The class gift in favor of A's children who reach 30 would violate the Common-law Rule Against Perpetuities and, thus, is not validated by Section 1(a)(1). Its validity is therefore governed by Section 1(a)(2).

Suppose that after G's death, and during A's lifetime, X and Y die and a third child (Z) is born to or adopted by A. At A's death, Z is living but her age is such that she cannot reach 30 within the remaining part of the 90-year period following G's death. As of A's death, it has become the situation that Z's interest cannot vest within the allowable period. The circumstances requisite to reformation under subsection (3) have arisen. An appropriate result would be for the court to lower the age contingency to the age Z can reach 90 years after G's death.

Additional References. For additional discussion and illustrations of the application of some of the principles of this section, see the Comments to Restatement (Second) of Property (Donative Transfers) § 1.5 (1983).

§ 41-18. Exclusions from statutory rule against perpetuities.

G.S. 41-15 does not apply to:

(1) A nonvested property interest or a power of appointment arising out of a nondonative transfer, except a nonvested property interest or a power of appointment arising out of:
  a. A premarital or postmarital agreement;
  b. A separation or divorce settlement;
  c. A spouse's election;
  d. A similar arrangement arising out of a prospective, existing, or previous marital relationship between the parties;
  e. A contract to make or not to revoke a will or trust;
  f. A contract to exercise or not to exercise a power of appointment;
  g. A transfer in satisfaction of a duty of support; or
  h. A reciprocal transfer;

(2) A fiduciary's power relating to the administration or management of assets, including the power of a fiduciary to sell, lease, or mortgage property, and the power of a fiduciary to determine principal and income;

(3) A power to appoint a fiduciary;

(4) A discretionary power of a trustee to distribute principal before termination of a trust to a beneficiary having an indefeasibly vested interest in the income and principal;

(5) A nonvested property interest held by a charity, government, or governmental agency or subdivision, if the

nonvested property interest is preceded by an interest held by another charity, government, or governmental agency or subdivision;

(6) A nonvested property interest in or a power of appointment with respect to a trust or other property arrangement forming part of a pension, profit-sharing, stock bonus, health, disability, death benefit, income deferral, or other current or deferred benefit plan for one or more employees, independent contractors, or their beneficiaries or spouses, to which contributions are made for the purpose of distributing to or for the benefit of the participants or their beneficiaries or spouses the property, income, or principal in the trust or other property arrangement, except a nonvested property interest or a power of appointment that is created by an election of a participant or a beneficiary or spouse;

(7) A property interest, power of appointment, or arrangement that was not subject to the common-law rule against perpetuities or is excluded by another statute of this State.

(8) A property interest or arrangement subjected to a time limit under Article 14 of Chapter 36A, "Honorary Trusts; Trusts for Pets; Trusts for Cemetery Lots"; or

(9) A property interest or arrangement subjected to a time limit under Article 3 of this Chapter, "Time Limits on Options in Gross and Certain Other Interests in Land". (1995, c. 190, ss. 1-3.)

OFFICIAL COMMENT

Section 4 lists seven exclusions from the Statutory Rule Against Perpetuities (Statutory Rule). Some are declaratory of existing law; others are contrary to existing law. Since the Common-law Rule Against Perpetuities is superseded by this Act (or a statutory version or variation thereof is repealed by this Act), a nonvested property interest, power of appointment, or other arrangement excluded from the Statutory Rule by this section is not subject to any rule against perpetuities, statutory or otherwise.

A. SUBSECTION (1): NONDONATIVE TRANSFERS EXCLUDED

Rationale. In line with long-standing scholarly commentary, subsection (1) excludes (with certain enumerated exceptions) nonvested property interests and powers of appointment arising out of a nondonative transfer. The rationale for this exclusion is that the Rule Against Perpetuities is a wholly inappropriate instrument of social policy to use as a control over such arrangements. The period of the rule — a life in being plus 21 years — is not suitable for nondonative transfers, and this point applies with equal force to the 90-year allowable waiting period under the wait-and-see element of Section 1 because that period represents an approximation of the period of time that would be produced, on average, by using a statutory list identifying actual measuring lives and adding a 21-year period following the death of the survivor.

No general exclusion from the Common-law Rule Against Perpetuities is recognized for nondonative transfers, and so subsection (1) is contrary to existing common law. (But see Metropolitan Transportation Authority v. Bruken Realty Corp., 67 N.Y.2d 156, 492 N.E.2d 379, 384 (1986), pointing out the inappropriateness of the period of a life in being plus 21 years to cases of commercial and governmental transactions and noting that the Rule Against Perpetuities can invalidate legitimate transactions in such cases.)

Subsection (1) is therefore inconsistent with decisions holding the Common-law Rule to be applicable to the following types of property interests or arrangements when created in a nondonative, commercial-type transaction, as they almost always are: options (e.g., Milner v. Bivens, 335 S.E.2d 288 (Ga. 1985)); preemptive rights in the nature of a right of first refusal (e.g., Atchison v. City of Englewood, 170 Colo. 295, 463 P.2d 297 (1969); Robroy Land Co., Inc. v. Prather, 24 Wash. App. 511, 601 P.2d 297 (1969)); leases to commence in the future, at a time certain or on the happening of a future event such as the completion of a building (e.g., Southern Airways Co. v. DeKalb County, 101 Ga. App. 689, 115 S.E.2d 207 (1960)); nonvested easements; top leases and top deeds with respect to interests in minerals (e.g., Peveto v. Starkey, 645 S.W.2d 770 (Tex. 1982)); and so on.

Consideration Does Not Necessarily Make the Transfer Nondonative. A transfer can be supported by consideration and still be donative in character and hence not excluded from the Statutory Rule. A transaction that is essentially gratuitous in nature, accompanied by donative intent on the part of at least one party to the transaction, is not to be regarded as nondonative simply because it is for consideration. Thus, for example, the exclusion would not apply if a parent purchases a parcel of land for full and adequate consideration, and directs the seller to make out the deed in favor of the purchaser's daughter for life, remainder to such of the daughter's children as reach 25. The nonvested property interest of the daughter's children is subject to the Statutory Rule.

Some Transactions Not Excluded Even if Considered Nondonative. Some types of transactions — although in some sense supported by consideration and hence arguably nondonative — arise out of a domestic situation, and should not be excluded from the Statutory Rule. To avoid uncertainty with respect to such transactions, subsection (1) specifies that nonvested property interests or powers of appointment arising out of any of the following transactions are not excluded by subsection (1)'s nondonative-transfers exclusion: a premarital or postmarital agreement; a separation or divorce settlement; a spouse's election, such as the "widow's election" in community property states; an arrangement similar to any of the foregoing arising out of a prospective, existing, or previous marital relationship between the parties; a contract to make or not to revoke a will or trust; a contract to exercise or not to exercise a power of appointment; a transfer in full or partial satisfaction of a duty of support; or a reciprocal transfer. The term "reciprocal transfer" is to be interpreted in accordance with the reciprocal transfer doctrine in the tax law (see United States v. Estate of Grace, 395 U.S. 316 (1969)).

Other Means of Controlling Some Nondonative Transfers Desirable. Some commercial transactions respecting land or mineral interests, such as options in gross (including rights of first refusal), leases to commence in the future, nonvested easements, and top leases and top deeds in commercial use in the oil and gas industry, directly or indirectly restrain the alienability of property or provide a disincentive to improve the property. Although controlling the duration of such interests is desirable, they are excluded by subsection (1) from the Statutory Rule because, as noted above, the period of a life in being plus 21 years — actual or by the 90-year proxy — is inappropriate for them; that period is appropriate for family-oriented, donative transfers.

The Committee was aware that a few states have adopted statutes on perpetuities that include special limits on certain commercial transactions (e.g., Fla. Stat. § 689.22(3)(a); Ill. Rev. Stat. ch. 30, § 194(a)), and in fact the Committee itself drafted a comprehensive version of Section 4 that would have imposed a 40-year period-in-gross limitation in specified cases. In the end, however, the Committee did not present that version to the National Conference for approval because it was of the opinion that the control of these interests is better left to other types of statutes, such as marketable title acts (e.g., the Uniform Simplification of Land Transfers Act) and the Uniform Dormant Mineral Interests Act, backed up by the potential application of the common-law rules regarding unreasonable restraints on alienation.

B. SUBSECTIONS (2)-(7): OTHER EXCLUSIONS

Subsection (2) — Administrative Fiduciary Powers. Fiduciary powers are subject to the Statutory Rule Against Perpetuities, unless specifically excluded. Purely administrative fiduciary powers are excluded by subsections (2) and (3), but distributive fiduciary powers are generally speaking not excluded. The only distributive fiduciary power excluded is the one described in subsection (4).

The application of subsection (2) to fiduciary powers can be illustrated by the following example.

Example (1). G devised property in trust, directing the trustee (a bank) to pay the income to A for life, then to A's children for the life of the survivor, and on the death of A's last surviving child to pay the corpus to B. The trustee is granted the discretionary power to sell and to reinvest the trust assets and to invade the corpus on behalf of the income beneficiary or beneficiaries.

The trustee's fiduciary power to sell and reinvest the trust assets is a purely administrative power, and under subsection (2) of this section is not subject to the Statutory Rule.

The trustee's fiduciary power to invade corpus, however, is a nongeneral power of appointment that is not excluded from the Statutory Rule. Its validity, and hence its exercisability, is governed by Section 1. Under that section, since the power is not initially valid under Section 1(c)(1), Section 1(c)(2) applies and the power ceases to be exercisable 90 years after G's death.

Subsection (3) — Powers to Appoint a Fiduciary. Subsection (3) excludes from the Statutory Rule Against Perpetuities powers to appoint a fiduciary (a trustee, successor trustee, or co-trustee, a personal representative, successor personal representative, or co-personal representative, an executor, successor executor, or co-executor, etc.). Sometimes such a power is held by a fiduciary and sometimes not. In either case, the power is excluded from the Statutory Rule.

Subsection (4) — Certain Distributive Fiduciary Power. The only distributive fiduciary power excluded from the Statutory Rule Against Perpetuities is the one described in subsection (4); the excluded power is a discretionary power of a trustee to distribute principal before the termination of a trust to a beneficiary who has an indefeasibly vested interest in the income and principal.

Example (2). G devised property in trust, directing the trustee (a bank) to pay the income to A for life, then to A's children; each child's share of principal is to be paid to the child when he or she reaches 40; if any child dies under 40, the child's share is to be paid to the child's estate as a property interest owned by such child. The trustee is given the discretionary power to advance all or a portion of a child's share before the child reaches 40. G was survived by A, who was then childless.

The trustee's discretionary power to distribute principal to a child before the child's 40th birthday is excluded from the Statutory Rule Against Perpetuities. (The trustee's *duty* to pay the income to A and after A's death to A's children is not subject to the Statutory Rule because it is a duty, not a power.)

Subsection (5) — Charitable or Governmental Gifts. Subsection (5) codifies the common-law principle that a nonvested property interest held by a charity, a government, or a governmental agency or subdivision is excluded from the Rule Against Perpetuities if the interest was preceded by an interest that is held by another charity, government, or governmental agency or subdivision. See L. Simes & A. Smith, The Law of Future Interests §§ 1278-87 (2d ed. 1956); Restatement (Second) of Property (Donative Transfers) § 1.6 (1983); Restatement of Property § 397 (1944).

Example (3). G devised real property "to the X School District so long as the premises are used for school purposes, and upon the cessation of such use, to Y City."

The nonvested property interest held by Y City (an executory interest) is excluded from the Statutory Rule under subsection (5) because it was preceded by a property interest (a fee simple determinable) held by a governmental subdivision, X School District.

The exclusion of charitable and governmental gifts applies only in the circumstances described. If a nonvested property interest held by a charity is preceded by a property interest that is held by a noncharity, the exclusion does not apply; rather, the validity of the nonvested property interest held by the charity is governed by the other sections of this Act.

Example (4). G devised real property "to A for life, then to such of A's children as reach 25, but if none of A's children reaches 25, to X Charity."

The nonvested property interest held by X Charity is not excluded from the Statutory Rule.

If a nonvested property interest held by a noncharity is preceded by a property interest that is held by a charity, the exclusion does not apply; rather, the validity of the nonvested property interest in favor of the noncharity is governed by the other sections of this Act.

Example (5). G devised real property "to the City of Sidney so long as the premises are used for a public park, and upon the cessation of such use, to my brother, B."

The nonvested property interest held by B is not excluded from the Statutory Rule by subsection (5).

Subsection (6) — Trusts for Employees and Others; Trusts for Self-Employed Individuals. Subsection (6) excludes from the Statutory Rule Against Perpetuities nonvested property interests and powers of appointment with respect to a trust or other property arrangement, whether part of a "qualified" or "unqualified" plan under the federal income tax law, forming part of a bona fide benefit plan for employees (including owner- employees), independent contractors, or their beneficiaries or spouses. The exclusion granted by this subsection does not, however, extend to a nonvested property interest or a power of appointment created by an election of a participant or beneficiary or spouse.

Subsection (7) — Pre-existing Exclusions from the Common-law Rule Against Perpetuities. Subsection (7) assures that all property interests, powers of appointment, or arrangements that were excluded from the Common-law Rule Against Perpetuities or are excluded by another statute of this state are also excluded from the Statutory Rule Against Perpetuities.

Possibilities of reverter and rights of entry (also known as rights of re-entry, rights of entry for condition broken, and powers of termination) are not subject to the Common-law Rule Against Perpetuities, and so are excluded from the Statutory Rule. By statute in some states, possibilities of reverter and rights of entry expire if they do not vest within a specified period of years (such as 40 years). See Fratcher, A Modest Proposal for Trimming the Claws of Legal Future Interests, 1972 Duke L.J. 517, 527-31. See also Uniform Simplification of Land Transfers Act § 3-409. States adopting the Uniform Statutory Rule Against Perpetuities may wish to consider the enactment of some such limit on these interests, if they have not already done so.

Editor's Note. — Session Laws 1995, c. 190, s. 2, effective October 1, 1995, provided that in the event that the 1995 General Assembly enacted a new Article of Chapter 36A of the General Statutes, entitled "Honorary Trusts; Trusts for Pets; Trusts for Cemetery Lots", this section would be amended by adding subdivision (8). That Article was enacted, and thus subdivision (8) has been set out above.

Session Laws 1995, c. 190, s. 3, effective October 1, 1995, provided that in the event that the 1995 General Assembly enacted a new Article of Chapter 41 of the General Statutes, entitled "Time Limits on Options in Gross and Certain Other Interests in Land", this section would be amended by adding subdivision (9). That Article was enacted, and thus subdivision (9) has been set out above.

§ 41-19. Prospective application.

(a) Except as extended by subsection (b) of this section, this Article applies to a nonvested property interest or a power of appointment that is created on or after October 1, 1995. For purposes of this section, a nonvested property interest or a power of appointment is created when the power is irrevocably exercised or when a revocable exercise becomes irrevocable.

(b) If a nonvested property interest or a power of appointment was created prior to October 1, 1995, and is determined in a judicial proceeding, commenced on or after October 1, 1995, to violate this State's rule against perpetuities as that rule existed before October 1, 1995, a court upon the petition of an interested person may reform the disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the limits of the rule against perpetuities applicable when the nonvested property interest or power of appointment was created. (1995, c. 190, s. 1.)

OFFICIAL COMMENT

Subsection (a): Act Not Retroactive. This section provides that, except as provided in subsection (b), the Statutory Rule Against Perpetuities and the other provisions of this Act apply only to nonvested property interests or powers of appointment created on or after the Act's effective date. With one exception, in determining when a nonvested property interest or a power of appointment is created, the principles of Section 2 are applicable. Thus, for example, a property interest (or a power of appointment) created in a revocable inter vivos trust is created when the power to revoke terminates. See Example (1) in the Comment to Section 2.

The second sentence of subsection (a) establishes a special rule for nonvested property interests (and powers of appointment) created by the exercise of a power of appointment. For purposes of this section only, a nonvested property interest (or a power of appointment) created by the exercise of a power of appointment is created when the power is irrevocably exercised or when a revocable exercise of the power becomes irrevocable. Consequently, all the provisions of this Act except Section 5(b) apply to a nonvested property interest (or power of appointment) created by a donee's exercise of a power of appointment where the donee's exercise, whether revocable or irrevocable, occurs on or after the effective date of this Act. All the provisions of this Act except Section 5(b) also apply where the donee's exercise occurred before the effective date of this Act if: (i) that pre-effective-date exercise was revocable *and* (ii) that revocable exercise becomes irrevocable on or after the effective date of this Act. This special rule applies to the exercise of all types of powers of appointment — presently exercisable general powers, general testamentary powers, and nongeneral powers.

If the application of this special rule determines that the provisions of this Act (except Section 5(b)) apply, then for all such purposes, the time of creation of the appointed nonvested property interest (or appointed power of appointment) is determined by reference to Section 2, without regard to the special rule contained in the second sentence of Section 5(a).

If the application of this special rule of Section 5(a) determines that the provisions of this Act (except Section 5(b)) do not apply, then Section 5(b) is the only potentially applicable provision of this Act.

Example (1) — Testamentary Power Created Before but Exercised After the Effective Date of this Act. G was the donee of a general testamentary power of appointment created by the will of his mother, M. M died in 1980. Assume that the effective date of this Act in the jurisdiction is January 1, 1987. G died in 1988, leaving a will that exercised his general testamentary power of appointment.

Under the special rule in the second sentence of Section 5(a), any nonvested property interest (or power of appointment) created by G in his will in exercising his general testamentary power was created (for purposes of Section 5) at G's death in 1988, which was *after* the effective date of this Act.

Consequently, all the provisions of this Act apply (except Section 5(b)). That point having been settled, the next step is to determine whether the nonvested property interests or powers of appointment created by G's testamentary appointment are initially valid under Section 1(a)(1), 1(b)(1), or 1(c)(1), or whether the wait-and-see element established in Section 1(a)(2), 1(b)(2), or 1(c)(2) apply. If the wait-and-see element does apply, it must also be determined when the allowable 90-year waiting period starts to run. In making these determinations, the principles of Section 2 control the time of creation of the nonvested property interests (or powers of appointment); under Section 2, since G's power was a general testamentary power of appointment, the common-law relation-back doctrine applies and the appointed nonvested property interests (and appointed powers of appointment) are created at M's death in 1980. If G's testamentary power of appointment had been a nongeneral power rather than a general power, the same results as described above would apply.

Example (2) — Presently Exercisable Nongeneral Power Created Before but Exercised After the Effective Date of this Act. Assume the same facts as in Example (1), except that G's power of appointment was a presently exercisable nongeneral power. If G exercised the power in 1988, after the effective date of this Act (or, if a pre-effective-date revocable exercise of his power became irrevocable in 1988, after the effective date of this Act), the same results as described above in Example (1) would apply.

Example (3) — Presently Exercisable General Power Created Before but Exercised After the Effective Date of this Act. Assume the same facts as in Example (1), except that G's power of appointment was a presently exercisable general power. If G exercised the power in 1988, after the effective date of this Act (or, if a pre-effective-date revocable exercise of his power became irrevocable in 1988, after the effective date of this Act), all the provisions of this Act (except Section 5(b)) apply; for such purposes, Section 2 controls the date of creation of the appointed nonvested property interests (or appointed powers of appointment), without regard to the special rule of the second sentence of Section 5(a). With respect to the exercise of a presently exercisable general power, it is possible — indeed, probable — that the special rule of the second sentence of Section 5(a) and the rules of Section 2 agree on the same date of creation for their respective purposes, that date being the date the power was irrevocably exercised (or a revocable exercise thereof became irrevocable).

Subsection (b): Reformation of Pre-existing Instruments. Although the Statutory Rule Against Perpetuities and the other provisions of this Act do not apply retroactively, subsection (b) recognizes a court's authority to exercise its equitable power to reform instruments that contain a violation of the Common-law Rule Against Perpetuities (or of a statutory version or variation thereof) and to which the Statutory Rule does not apply because the offending nonvested property interest or power of appointment in question was created before the effective date of this Act. This equitable power to reform is recognized only where the violation of the former rule against perpetuities is determined in a judicial proceeding that is commenced on or after the effective date of this Act. See below.

Without legislative authorization or direction, the courts in four states — Hawaii, Mississippi, New Hampshire, and West Virginia — have held that they have the power to reform instruments that contain a violation of the Common-law Rule Against Perpetuities. *In re Estate of Chun Quan Yee Hop*, 52 Hawaii 40, 469 P.2d 183 (1970); Carter v. Berry, 243 Miss. 321, 140 So.2d 843 (1962); Edgerly v. Barker, 66 N.H. 434, 31 A. 900 (1891); Berry v. Union Natl. Bank, 262 S.E.2d 766 (W.Va. 1980). In four other states — California, Missouri, Oklahoma, and Texas — the legislatures have enacted statutes conferring this power on the courts or directing the courts to reform defective instruments. Cal. Civ. Code § 715.5 (West 1982); Mo. Rev. Stat. § 442.555 (1978); Okla. Stat. tit. 60, §§ 75-78 (1981); Tex. Property Code § 5.043 (Vernon 1984). See also Idaho Code § 55-111 (1948). The California statute is silent as to whether or not it applies to nonvested property interests and powers of appointment created prior to the effective date of the Act; the only significant California appellate decision to apply the statute, *Estate of Ghiglia*, 42 Cal.App.3d 433, 116 Cal. Rptr. 827 (1974), involved a will where the testator died after the Act's effective date. The Missouri, Oklahoma, and Texas statutes explicitly do not apply retroactively. The Hawaii, Mississippi, New Hampshire, and West Virginia decisions, however, invoked the court's equitable power (sometimes called the cy pres power, and sometimes called the doctrine of equitable approximation or equitable modification) to reform pre-existing instruments that contained a violation of the Common-law Rule. Subsection (b) constitutes statutory authority for a court to exercise its equitable reformation power.

Reformation Experience So Far. The existing judicial opinions and legislative provisions purport to adopt a principle of reformation that is consistent with the theme that the technique of reform should be shaped to grant every appropriate opportunity for the property to go to the intended beneficiaries. The New Hampshire court, for example, said that "where there is a general and a particular intent, and the particular one cannot take effect, the words shall be so construed as to give effect to the general intent." Edgerly v. Barker, 66 N.H. 434, 467, 31 A. 900, 912 (1891) (citation omitted). The Hawaii court held that "any interest which would violate the Rule Against Perpetuities shall be reformed within the limits of that rule to approximate most closely the intention of the creator of the interest." *In re Estate of Chun Quan Yee Hop*, 52 Hawaii 40, 46, 469 P.2d 183, 187 (1970). The Mississippi court described the reformation principle as "a simple rule of judicial construction, designed to aid the court to ascertain and carry out, as nearly as may be, the intention of the donor." Carter v. Berry, 243 Miss. 321, 370, 140 So.2d 843, 852 (1962). The California statute provides that the authority to reform "shall be liberally construed and applied to validate [the] interest to the fullest extent consistent with [the] ascertained intent." Cal. Civ. Code § 715.5.

Unfortunately, all the cases that have arisen so far have been of one general type — contingencies in excess of 21 years — and all of the courts have simply ordered a reduction of the age or period in gross to 21.

Guidance as to How to Reform. The above reformation efforts are unduly narrow. Subsection (b) is to be understood as authorizing a more appropriate technique — judicial insertion of a saving clause into the instrument. See Browder, *Construction, Reformation, and the Rule Against Perpetuities*, 62 Mich.L.Rev. 1 (1963); Waggoner, *Perpetuity Reform*, 81 Mich.L.Rev. 1718, 1755-1759 (1983); Langbein & Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U.Pa.L.Rev. 521, 546-49 (1982). This method of reformation allows reformation to achieve an after-the-fact duplication of a professionally competent product. Such a technique would have been especially suitable in the cases that have already arisen, for it probably would have allowed the dispositions in all of them to have been rendered valid without disturbing the transferor's intent at all. See Waggoner, *Perpetuity Reform*, 81 Mich.L.Rev. 1718, 1756 n. 103 (1983). The insertion of a saving clause grants a more appropriate opportunity for the property to go to the intended beneficiaries. Furthermore, it would also be a suitable technique in fertile octogenarian, unborn widow, and administrative contingency cases. A saving clause is one of the formalistic devices that a professionally competent lawyer would have used before the fact to assure initial validity in these cases. Insofar as other violations are concerned, the saving clause technique also grants every appropriate opportunity for the property to go to the intended beneficiaries.

In selecting the lives to be used for the perpetuity-period component of the saving clause that in a given case is to be inserted after the fact, the principle to be adopted is the same one that ought to guide lawyers in drafting such a clause before the fact: The group selected should be appropriate to the facts and the disposition. While the exact make-up of the group in each case would be settled by litigation, the individuals designated in Section 1.3(2) of the Restatement (Second) of Property (Donative Transfers) (1983) as the measuring lives would be an appropriate referent for the court to consider. Care should be taken in formulating the gift-over component, so that it is appropriate to the dispositive scheme. Among possible recipients that the court might consider designating are: (i) the persons entitled to the income on the 21st anniversary of the death of the last surviving individual designated by the court for the perpetuity-period component and in the proportions thereof to which they are then so entitled; if no proportions are specified, in equal shares to the permissible recipients of income; or (ii) the grantor's descendants per stirpes who are living 21 years after the death of the last surviving individual designated by the court for the perpetuity-period component; if none, to the grantor's heirs at law determined as if the grantor died 21 years after the death of the last surviving individual designated in the perpetuity-period component.

Violation Must be Determined in a Judicial Proceeding Commenced On or After the Effective Date of this Act. The equitable power to reform is recognized by Section 5(b) only in situations where the violation of the former rule against perpetuities is determined in a judicial proceeding commenced on or after the effective date of this Act. The equitable power to reform would typically be exercised in the same judicial proceeding in which the invalidity is determined.

§ 41-20. Short title.

This Article may be cited as the Uniform Statutory Rule Against Perpetuities. (1995, c. 190, s. 1.)

§ 41-21. Uniformity of application and construction.

This Article shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this Article among states enacting it. (1995, c. 190, s. 1.)

§ 41-22. Supersession.

This Article supersedes the rule of the common law known as the rule against perpetuities. (1995, c. 190, s. 1.)

§§ 41-23 through 41-27: Reserved for future codification purposes.

ARTICLE 3.

Time Limits on Options in Gross and Certain Other Interests in Land.

COMMENTARY

Article 3 is based upon a proposed Uniform Act that is under consideration by the Joint Editorial Board for the Uniform Probate Code. G.S. 41-28 and 41-33 have no counterpart in the proposed Uniform Act.

The following comments were prepared to accompany the proposed Uniform Act. The drafters of the North Carolina Act believe that these comments provide a useful guide to the Act. Minor changes have been made to correspond to the North Carolina Act.

Some transactions respecting land, such as options in gross (including rights of first refusal), leases to commence in the future, and nonvested easements, directly or indirectly restrain the alienability of property or provide a disincentive to improve the property.

Article 3 contains sections that generally impose a 30-year time limit on such interests. To prevent an overlap with Article 2 of this Chapter, G.S. 41-18(9) excludes such interests from the Statutory Rule Against Perpetuities. (Many but not all such interests are also excluded by other subdivisions of G.S. 41-18.) The 90-year permissible vesting period of the Statutory Rule Against Perpetuities is an inappropriate limit on these interests. As an approximation of the period of a life in being plus 21 years, the 90-year period is an appropriate limit on interests arising out of family-oriented donative transfers. A shorter period is a more appropriate limit on the interests covered in Article 3, whether those interests arise out of a donative or a nondonative transfer.

The sections in this Article contain language exempting arrangements relating solely to interests in oil, gas, or minerals. The purpose is to assure that these sections do not interfere with bona fide commercial arrangements in the oil, gas, and mining industries.

Editor's Note. — Permission to include the Official Comments was granted by the National Conference of Commissioners on Uniform State Laws and The American Law Institute. It is believed that the Official Comments will prove of value to the practitioner in understanding and applying the text of this Chapter.

§ 41-28. Definitions.

As used in this Article:

(1) "Nonvested easement in gross" means a nonvested easement which is not created to benefit or which does not benefit the possessor of any tract of land in his or her use of it as the possessor.

(2) "Option in gross with respect to an interest in land" means an option in which the holder of the option does not own any leasehold or other interest in the land which is the subject of the option.

(3) "Preemptive right in the nature of a right of first refusal in gross with respect to an interest in land" means a preemptive right in which the holder of the preemptive right does not own any leasehold or other interest in the land which is the subject of the preemptive right. (1995, c. 525, s. 1.)

Editor's Note. — Session Laws 1995, c. 525, s. 3, made this Article effective October 1, 1995.

§ 41-29. Options in gross, etc.

An option in gross with respect to an interest in land or a preemptive right in the nature of a right of first refusal in gross with respect to an interest in land becomes invalid if it is not actually exercised within 30 years after its creation. For purposes of this section, the term "interest in land" does not include arrangements relating solely to an interest in oil, gas, or minerals. (1995, c. 525, s. 1.)

COMMENTARY

This section imposes a 30-year time limit on the duration of options in gross and preemptive rights in gross with respect to an interest in land. The appellation "in gross" refers to the fact that the optionee or preemptioner has no possessory interest in the property.

If an option or preemptive right pertains to an interest in land, the option or preemptive right becomes invalid if it remains unexercised 30 years after its creation.

Example. A, the owner of Blackacre, sells an option to B under which A obligates himself, his heirs, and assigns at any time in the future to convey Blackacre to B, his heirs, and assigns for $X.00. Or, A, the owner of Blackacre, sells Blackacre to B. As part of the transaction, B obligates himself, his heirs, and assigns at any time in the future to reconvey Blackacre to A, his heirs, and assigns for $X.00. If either option remains unexercised 30 years after its creation, it ceases to be valid. (Both options are excluded from the Statutory Rule Against Perpetuities by G.S. 41-18(1) and (9).)

Options Held by a Lessee Not Affected by this Section. This section does not apply to an option or right of first refusal (preemptive right) that is not in gross. Thus, this section does not apply to an option or preemptive right held by a lessee to renew, extend, or enter into a new lease of or to purchase the leased premises. Such options or rights of first refusal do not deter the lessee from making improvements on the property, and so public policy is not viewed as requiring controls on their duration.

§ 41-30. Leases to commence in the future.

A lease to commence at a time certain or upon the occurrence or nonoccurrence of a future event becomes invalid if its term does not actually commence in possession within 30 years after its execution. For purposes of this section, the term "lease" does not include an oil, gas, or mineral lease. (1995, c. 525, s. 1.)

COMMENTARY

G.S. 41-30 provides that a lease to commence at a time certain or upon the happening of a future event becomes invalid if the term does not actually commence in possession within 30 years after the lease's execution.

Such leases are excluded from the Statutory Rule Against Perpetuities by G.S. 41-18(1) and (9). Excluding such leases from the Rule Against Perpetuities removes a source of considerable litigation under the common-law Rule Against Perpetuities concerning the validity of so-called "on completion" leases — leases to commence on the completion of a building.

Such leases would be clearly valid at common law if the lessor was obligated to complete the building within 21 years, but in the absence of an explicit obligation of this sort, some courts have held the lease to be invalid. E.g., Southern Airways Co. v. DeKalb County, 101 Ga. App. 689, 115 S.E.2d 207 (1960); others, though, have upheld such leases on the theory that the lessee's interest was vested from the beginning (Isen v. Giant Food, Inc., 295 F.2d 136 (D.C. Cir. 1960)); or that there was an implicit obligation to complete the building within a reasonable time (Wong v. DiGrazia, 60 Cal.2d 525, 386 P.2d 817 (1963); Singer Co. v. Makad, Inc., 213 Kan. 725, 518 P.2d 493 (1974); see also Read v. GHDC, Inc., 334 S.E.2d 165 (Ga. 1985); Ryland Group, Inc. v. Wills, 331 S.E.2d 399 (Va. 1985)).

Although the risk under the common-law Rule Against Perpetuities that such leases would be declared invalid from the beginning would be removed by the wait-and-see feature of the Statutory Rule Against Perpetuities, such leases are excluded from the Statutory Rule entirely. A shorter period than the 90 years allowed by the Statutory Rule is more appropriate to commercial transactions that impinge upon the marketability of land, and the 30-year period selected should give reasonable time for such leases to commence in possession.

§ 41-31. Nonvested easements.

A nonvested easement in gross becomes invalid if it does not actually vest within 30 years after its creation. (1995, c. 525, s. 1.)

COMMENTARY

This section places a 30-year limit on the time during which a nonvested easement in gross can remain nonvested. An easement is nonvested if the right of utilization is subject to a condition precedent, i.e., if the right of utilization is conditioned upon the happening of a specified future event. An easement is in gross if it has a servient estate but no dominant estate; an easement in gross is a personal interest in the land of another. The difficulty of locating the owner of a nonvested easement in gross as time goes along is the principal reason for limiting to 30 years the time during which the easement can remain nonvested.

Whether or not an easement is vested depends on whether the holder has the current right to utilize it. Thus, an easement can be vested even if the holder has not actually utilized it. If, however, the easement holder has actually utilized the easement, the easement is vested by definition. For example, an easement to transmit electric power across land from a power plant would be vested, if it had not previously vested, when the holder of the easement commenced to install power transmission lines on the land; vesting would not be delayed until power is actually transmitted through those lines.

This section does not limit the duration of a vested easement, nor does it affect an easement that is vested subject to a defeasance clause that may cause it to terminate. Nor does this section affect multiple floating easements, which are also called single expansible easements with multiple potential routes, because they are vested. E.g., Kleinheider v. Phillips Pipe Line Co., 528 F.2d 837, 843-44 (8th Cir. 1975).

Exemption from Rule Against Perpetuities. Because nonvested easements in gross are governed by a 30-year time limit, they are exempted from the Statutory Rule Against Perpetuities by G.S. 41-18(9). This reverses the rule at common law, under which nonvested easements were subjected to the common-law Rule Against Perpetuities and rendered invalid ab initio if they were not certain to vest or terminate within a life in being plus 21 years. J. Gray, The Rule Against Perpetuities §§ 314-16 (4th ed. 1942); L. Simes & A. Smith, The Law of Future Interests § 1248 (2d ed. 1956).

§ 41-32. Possibilities of reverter, etc.

(a) Except as otherwise provided in this section:

(1) A possibility of reverter preceded by a fee simple determinable;

(2) A right of entry preceded by a fee simple subject to a condition subsequent; or

(3) An executory interest preceded by either a fee simple determinable or a fee simple subject to an executory limitation;

becomes invalid, and the preceding fee simple becomes a fee simple absolute, if the right to vest in possession of the possibility of reverter, right of entry, or executory interest depends on an event or events affecting the use of land and if the possibility of reverter, right of entry, or executory interest does not actually vest in possession within 60 years after its creation.

(b) This section does not apply to a possibility of reverter, right of entry, or executory interest held by a charity, a government or governmental agency or subdivision excluded from the Uniform Statutory Rule Against Perpetuities by G.S. 41-18(5) or to an arrangement relating solely to an interest in oil, gas, or minerals. (1995, c. 525, s. 1.)

COMMENTARY

With certain exceptions, this section imposes a 60-year time limit on the duration of certain possibilities of reverter, rights of entry (also known as rights of re-entry, rights of entry for condition broken, and powers of termination), and executory interests.

Possibilities of reverter and rights of entry are generally exempt from the common-law Rule Against Perpetuities. But their nonreversionary counterpart — the executory interest that follows either a fee simple determinable or a fee simple subject to an executory limitation — is subject to the common-law Rule. By statute in some states, possibilities of reverter and rights of entry expire if they do not vest within a specified period of years (such as 30 or 40 years). These statutes, however, do not apply to the type of executory interest described above, which is the nonreversionary counterpart of the possibility of reverter and/or right of entry.

G.S. 41-32 treats all three future interests alike by limiting their duration to 60 years and by excluding them from the Statutory Rule. Unless the possibility of reverter, right of entry, or executory interest is an interest in favor of a charity, government, or governmental agency or subdivision that is excluded from the Statutory Rule by G.S. 41-18(5) [or is an arrangement relating solely to an interest in oil, gas, or minerals], the maximum period any of the three can exist is limited to 60 years; if it has not vested by the 60th anniversary of its creation, it ceases to exist and the preceding fee simple becomes a fee simple absolute.

Example 1. G deeded real property: [Alternative 1] "to the City of Sidney for as long as the property is used for a public park, and upon the property ceasing to be used for that purpose, the property is to go to B and his heirs."

[Alternative 2] "to the City of Sidney for as long as the property is used for a public park, and upon the property ceasing to be used for that purpose, the property is to revert to G and his heirs."

In both alternatives, the City of Sidney has a fee simple determinable. In Alternative 1, B has an executory interest. In Alternative 2, G has a possibility of reverter. Both B's and G's future interests are excluded from the Statutory Rule by G.S. 41-18(9). Both are subject to the 60-year limit on their existence imposed by G.S. 41-32. If the property is still being used for a public park on the 60th anniversary of the date of delivery of G's deed, the City of Sidney's fee simple becomes a fee simple absolute.

Example 2. G deeded real property: [Alternative 1] "to A and his heirs on condition that the property be used for residential purposes, and if the property is not used for residential purposes, G is to have the right to re-enter and take possession of the premises."

[Alternative 2] "to A and his heirs, but if the property is not used for residential purposes, to B and his heirs." In Alternative 1, A has a fee simple subject to a condition subsequent; G has a right of entry that is excluded from the Statutory Rule Against Perpetuities. In Alternative 2, A has a fee simple subject to an executory limitation; B has an executory interest that is excluded from the Statutory Rule Against Perpetuities.

In both alternatives, A's fee simple becomes a fee simple absolute on the 60th anniversary of the date of delivery of G's deed, unless the property was used for nonresidential purposes on or before that date and, in Alternative 1, unless G has properly exercised his right of entry on or before that date.

Event or Events Affecting the Use of Land. G.S. 41-32 only applies to possibilities of reverter, rights of entry, and executory interests if the vesting depends on an event or events affecting the use of land. The purpose of this restriction is to exempt family-oriented dispositions from the 60-year time limit in cases where the Statutory Rule Against Perpetuities is a more appropriate measure for controlling the interest.

Example 3. G's will devised real property "to my daughter A and her heirs, but if she should die without descendants, to my son B and his heirs."

Although B has an executory interest preceded by a fee simple subject to an executory limitation, B's executory interest is not controlled by G.S. 41-32 because the event on which its vesting depends does not relate to the use of land. Instead, B's executory interest is governed by the Statutory Rule Against Perpetuities, under which it is valid from creation because it complies with G.S. 41-15(a)(1).

The phrase "event or events affecting the use of land" is to be given an interpretation appropriate to its purpose. Thus, a devise to a church "so long as the church shall maintain and promulgate its present religious belief and faith and continue as a church" is not a family-oriented disposition and should be found to describe an event affecting the use of the land.

Exception for Certain Charitable and Governmental Interest. The last sentence of G.S. 41-32 exempts certain interests held by a charity, a government, or governmental agency or subdivision from the 60-year time limit. The excluded interests are those excluded from the Statutory Rule Against Perpetuities by G.S. 41-18(5). That section codifies the common-law principle that a nonvested property interest held by a charity, a government, or a governmental agency or subdivision is excluded from the Rule Against Perpetuities if the interest was preceded by an interest held by another charity, government, or governmental agency or subdivision.

Example 4. G devised real property "to the X School District so long as the premises are used for school purposes, and upon the cessation of such use, to Y City." The nonvested property interest in favor of Y City (an executory interest) is excluded from the Statutory Rule under G.S. 41-18(5) because it was preceded by a property interest (a fee simple determinable) held by a governmental subdivision, X School District. The fact that the interest of Y City is excluded from the Statutory Rule Against Perpetuities by G.S. 41-18(5) means that the 60-year limit imposed on certain executory interests by G.S. 41-32 does not apply.

§ 41-33. Prospective application.

This Article applies only to a property interest or arrangement that is created on or after October 1, 1995. (1995, c. 525, s. 1.)

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

November 1, 1995

I, Michael F. Easley, Attorney General of North Carolina, do hereby certify that the foregoing 1995 Cumulative Supplement to the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Department of Justice of the State of North Carolina.

MICHAEL F. EASLEY
Attorney General of North Carolina

STATE OF NORTH CAROLINA

Department of Justice

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Michael F. Easley

Attorney General of North Carolina